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No. 09-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALTUS FINANCE S.A., *et al.*,
Petitioners,

v.

AIG RETIREMENT SERVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE B. FRIEDMAN
AVRAM LUFT
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Counsel for Petitioners Crédit Lyonnais S.A.

JOHN E. SCHREIBER
DEWEY & LEBOEUF LLP
333 South Grand Ave.
Suite 2600
Los Angeles, CA 90071
(213) 621-6000

Counsel for Petitioners Artemis S.A., Artemis Finance S.N.C., and Aurora S.A.

GEORGE J. TERWILLIGER III
Counsel of Record
DARRYL S. LEW
WHITE & CASE LLP
701 13th Street N.W.
Washington, D.C. 20005
(202) 626-3600
gterwilliger@whitecase.com

Counsel for Petitioners Consortium de Réalisation and CDR-Enterprises

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a district court may assess the plausibility of a claim for relief in light of the court's judicial experience and common sense when ruling on a motion for summary judgment as well as on a motion to dismiss?

2. Whether a district court, in conducting a plausibility analysis under Rule 12(b)(6), may, in light of its judicial experience and common sense, decline to credit allegations in an amended complaint that conflict with allegations in a prior complaint where no explanation is proffered for such amendments or the explanation is implausible?

PARTIES TO THE PROCEEDING

The parties to this proceeding, identified below, constitute all the parties to the proceedings in both the district court and the court of appeals.

Petitioners

The following parties are Petitioners herein. Each was a defendant in the district court and an appellee in the court of appeals. The Petitioners are:

Altus Finance S.A., a corporation organized under French law;

Artemis S.A., a corporation organized under French law;

Artemis Finance S.N.C., an entity doing business under French law;

Aurora S.A., a corporation organized under French law;

CDR Enterprises, a corporation organized under French law;

Consortium de Réalisation S.A., a corporation organized under French law;

Crédit Lyonnais S.A., a corporation organized under French law.

Respondent

Respondent is AIG Retirement Services, Inc.

Additional Parties

In addition to the above-listed Petitioners, MAAF Assurances and MAAF Vie S.A. were defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, the corporate Petitioners, each on its own behalf, disclose that:

1. Crédit Agricole S.A., a publicly traded French institution, owns more than 10% of Petitioner Crédit Lyonnais S.A.

2. The parent of Petitioner Artemis S.A. is Financiere Pinault. The parent of Petitioners Artemis Finance S.N.C. and Aurora S.A. is Artemis S.A. No publicly held company owns 10% or more of the stock of Artemis S.A., Artemis Finance S.N.C., or Aurora S.A.

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PETITION FOR A WRIT OF CERTIORARI

Altus Finance S.A., Artemis S.A., Artemis Finance S.N.C., Aurora S.A.,[1] CDR-Enterprises, Consortium de Réalisation S.A., and Crédit Lyonnais S.A., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum decision of the court of appeals is unreported. The district court's opinion that dismissed the Second Amended Complaint and the

[1] Petitioners Artemis S.A., Aurora S.A., and Artemis Finance S.N.C. are referred to hereinafter individually and collectively as "Artemis."

district court's opinion granting the petitioners' motions for summary judgment that are the subjects of the court of appeals' decision are unreported. The opinions are reproduced in the Appendix.

JURISDICTION

The court of appeals entered judgment on February 9, 2010. It denied a timely petition for rehearing on March 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns Federal Rules of Civil Procedure 12 and 56. Rule 12 is reproduced at 91a of the Appendix. Rule 56 is reproduced at 96a of the Appendix. No constitutional provisions are involved.

STATEMENT OF THE CASE

A. Background

In 1991, the former Executive Life Insurance Company ("ELIC") was in receivership and undergoing court-supervised rehabilitation pursuant to state law. A group of French investors including MAAF Assurances and other French concerns (the "Investor Group"), organized by the former Altus Finance S.A. ("Altus," now Petitioner Consortium de Réalisation-Entreprises, or "CDR-E")[2] submitted a bid for the

[2] Altus was then a subsidiary of Petitioner Crédit Lyonnais, at the time a French state-owned bank licensed in the United States and subject to regulation by the Federal Reserve Bank. As part of the privatization of Crédit Lyonnais, a defeasance corporation owned by the French State assumed many of the bank's non-performing subsidiaries and assets, including Altus. Altus sought to arrange a comprehensive bid for ELIC's insurance assets and its junk bond portfolio. Altus organized

assets of ELIC, as did several others, including SunAmerica, Inc.[3] The California Insurance Commissioner ("Commissioner") rejected AIG's bid as deficient.[4] The Commissioner selected the bid by the Investor Group, and sought court approval for a sale pursuant to that bid.

In 1993, at the direction of the Rehabilitation Court, the bidding was reopened to any and all potential bidders. The Commissioner again selected the Investor Group's bid and determined that the insurance assets should be sold to a holding company, New California Life Holdings, Inc. ("NCLH"), formed by the Investor Group.[5]

AIG did not submit any bid for the ELIC assets in the 1993 bid process. AIG instead, at the suggestion of the Commissioner, negotiated the purchase of a one-third interest in NCLH with the Investor Group, and the parties entered into a Stockholders Agreement. That agreement provided AIG a limited right of first refusal to buy the other two thirds of NCLH, which would not apply in the event of a sale to one of a list of "Permitted Transferee[s]" specified in the agreement, including Petitioner Artemis. After the sale closed, the members of the Investor Group sold

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and financed the Investor Group to bid for the insurance assets, while Altus would bid for the junk bond portfolio.

[3] According to Respondent AIG Retirement Services, Inc. ("AIGRS"), SunAmerica, Inc. (individually or collectively with AIGRS, "AIG") is AIGRS's predecessor.

[4] Among other things, the Commissioner wished to sell ELIC's underperforming junk bond portfolio as well as its insurance assets, while AIG's bid addressed only the insurance company.

[5] The junk bond portfolio was sold to Altus in a separate transaction that closed in 1992.

their two-thirds interest in NCLH to Artemis in two tranches, the first in August 1994, and the second in August 1995. The Commissioner knew of the proposed sale to Artemis at the time of the insurance transaction, and later approved the transfers.

B. AIG's Claims

More than ten years later, AIG sued Defendants,[6] claiming that it was denied ownership of 100% of the insurance assets held by NCLH as a result of undisclosed agreements between the Investor Group, Altus, and Artemis. AIG alleged that, by failing to disclose these agreements, Defendants tortiously interfered with AIG's economic and contractual expectations and defrauded AIG. The gravamen of both AIG's interference claims and its fraud claim is that "but for" the non-disclosure of the agreements to the Commissioner, AIG would have owned 100% of those insurance assets.[7] AIG seeks as damages the

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[6] Petitioners Altus Finance S.A., Artemis S.A., Aurora S.A., Artemis Finance S.N.C., CDR-Enterprises, Consortium de Réalisation S.A., and Crédit Lyonnais S.A., as well as MAAF Assurances and MAAF Vie S.A, were the defendants in the district court and are collectively referred to herein as "Defendants." The basis for jurisdiction in the United States District Court was 28 U.S.C. § 1332.

[7] Upon learning of the agreements in 1999, the Commissioner sued Defendants and members of the Investor Group for fraud, but has never sought to rescind the original transaction. Petitioners CDR, CDR-E, Crédit Lyonnais, and members of the Investor Group reached a pre-trial settlement with the Commissioner in 2005. Litigation between the Commissioner and Petitioner Artemis is ongoing. CDR, CDR-E, Crédit Lyonnais, and MAAF Assurances entered guilty pleas in 2003 to certain criminal offenses involving failures to disclose related information in connection with matters within the jurisdiction of the Federal Reserve.

profits from the two thirds of the insurance assets it does not own, approximately $800 million to $1 billion (including prejudgment interest) earned over approximately 17 years, despite having earned substantial profits and $118 million in dividends on its initial $33 million investment by 1998. Because denial of ownership of 100% of the new insurance company giving rise to those profits is the basis for AIG's claimed damages, AIG must be able on all its claims to demonstrate a basis to find that it was denied not merely an opportunity for ownership of the company, but that it would have acquired such ownership but for the wrongs alleged.

The agreements between Altus and the Investor Group were essentially "put" and "call" agreements, known under governing French law as "portage" agreements, related to potential, future transfers of the shares of NCLH.[8] AIG alleges that these agreements, which created the potential for future transfers of shares, violated state and federal law concerning ownership of an insurance company by a foreign bank such as Crédit Lyonnais. In addition to the portage agreements, the members of the Investor Group, Altus, and Artemis also entered into additional agreements concerning the transfer of the shares of NCLH to Artemis.

C. Proceedings Below

AIG filed its initial Complaint on February 9, 2005. In a meet and confer procedure required under local rules, Defendants provided notice that they intended to move under Federal Rule of Civil Procedure

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[8] These agreements on their face are not unlawful, and under the Stockholders Agreement, AIG itself had a "put" right of its interest in NCLH on agreed upon terms for a period of time.

12(b)(6) to dismiss AIG's interference claims pursuant to the applicable two-year statute of limitations because AIG's Complaint stated that it learned of its claims before the date the Commissioner filed his fraud claims, which was more than two years before the parties entered agreements tolling the statute of limitations. App. 99a. AIG then filed an amended complaint stating that it did not learn of its claims until *after* the Commissioner had filed.[9] App. 100a. In granting Defendants' subsequent motion to dismiss, the district court refused to give effect to this starkly conflicting amendment, concluding essentially that the purported explanation that there was no conflict because "before" really meant "after" was not plausible. App. 34a-36a. The district court also dismissed the interference claims on the alternative ground that AIG's allegations did not state a claim for relief because of the "speculative nature of [AIG's] claim that it had a reasonable expectation of acquiring the outstanding shares of [NCLH]" under its limited "right of first refusal." App. 37a n.10.

Following extensive discovery, Defendants moved for summary judgment on AIG's fraud claim. After the summary judgment hearing, AIG asserted for the first time that it had three separate theories of fraud, including a "defrauded bidder" claim (that it would

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[9] AIG first changed its allegation concerning when it learned of its claims in its First Amended Complaint, filed September 6, 2005. It repeated the changed allegation in its Second Amended Complaint, filed November 2, 2005, the pleading considered by the district court on Defendants' motions to dismiss. AIG argued that the language in its initial Complaint should not be read to state that it learned of its claims before or by the date the Commissioner filed his claims, notwithstanding the Complaint's use of the phrase "before the [Commissioner's action] was filed" to describe when AIG learned of its claims.

have acquired 100% of the insurance assets by submitting an independent bid to the Commissioner) and a "defrauded holder of a right of first refusal" claim (essentially a restatement of its previously dismissed tortious interference claims that, but for the alleged fraud, it would have acquired the other two thirds of NCLH from the members of the Investor Group via its right of first refusal).[10]

The district court concluded that each theory would require crediting AIG's predictions as to the outcome of a series of events necessary for AIG to have acquired all of the insurance assets, including decisions of third parties (*e.g.*, the Commissioner) over whom AIG had no control. The district court found that there was not a genuine issue of material fact for determination by the jury because AIG could not point to facts showing that it was reasonably certain (and hence plausible) that AIG's predicted outcomes for these events would occur. *See* App. 66a-74a.

Based on the record evidence, including the Commissioner's testimony, the following would have had to occur for AIG to prevail on its "defrauded bidder" theory: (1) the Commissioner choosing to rescind the entire 1993 deal with the Investor Group; (2) the Rehabilitation Court approving the rescission; (3) the Commissioner soliciting new bid proposals; (4) AIG submitting a proposal; (5) AIG's proposal covering the toxic junk bonds; (6) the Commissioner approving a plan to sell the entire insurance company to a single purchaser instead of several as under the AIG/Investor Group sale; (7) the Commissioner rejecting all other interested bidders; (8) the Reha-

[10] The third theory of recovery on its fraud claim AIG identified, which it dubbed its "defrauded purchaser" theory, is not at issue here.

bilitation Court approving the new proposal; and (9) the approved proposal withstanding review on appeal. App. 69a-70a.

Contrary to AIG's unsupported prediction that the Commissioner would simply have sold the insurance assets to it, however, the Commissioner testified explicitly that he would not have done so.[11] Moreover, AIG admitted that it was not interested in purchasing the junk bonds and would not have submitted a comprehensive bid (including both the junk bonds and the insurance company), which the Commissioner testified would have been required following rescission.

After summarizing its understanding of the proper summary judgment standard, including that AIG's claim had to be supported by plausible inferences, the district court concluded that AIG's cause of action rested on a predicted chain of events that was implausible because the absence of factual support for the theory would require a finder of fact to engage in impermissible speculation to find for AIG, and there was not a genuine issue for resolution by a jury. App. 68a-70a. With respect to the "defrauded holder of a right of first refusal" claim, the district court

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[11] In support of its argument that AIG would have acquired all of ELIC's insurance assets, AIG offered the declaration of Karl L. Rubinstein, former counsel to the Commissioner. Rubinstein opined that, had the Commissioner discovered the existence of the portage agreements in or around the Spring of 1993, he would have permitted AIG to acquire 100% of NCLH. The district court sustained Defendants' objections to Rubinstein's proffered "expert" testimony, concluding that his opinions were based on "nothing more than his personal or subjective beliefs and unsupported speculation." App. 68a-69a n.22.

likewise concluded that the claim was speculative and implausible and granted summary judgment for Defendants. App. 80a-84a.[12]

In a nine-page "memorandum" opinion, the Ninth Circuit summarily reversed the relevant district court rulings. With respect to the interference claims, the court of appeals held only that the district court had "prematurely dismissed [these claims] by resolving several contested factual issues on the pleadings." App. 7a.

While it did not expressly disagree that AIG would need to show that the numerous predicted events necessary to establish causation would have occurred, the court of appeals concluded that the district court had acted "prematurely" in preventing these claims from reaching the jury:

> Despite the possible existence of many alleged contingencies, the occurrence of which Defendants argue AIG would be called upon to prove at trial, the district court also erred when it prematurely determined that AIG's sought-after damages were impermissibly speculative. *See City Solutions*, 365 F.3d at 841.

App. 5a.[13] The court of appeals therefore reversed summary judgment on these claims.

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[12] Although AIG's theory of causation on its interference claims and "defrauded holder of a right of first refusal" fraud claim were the same, the district court dismissed only the interference claim on this ground at the motion to dismiss stage because AIG had not yet articulated its "defrauded holder of a right of first refusal" fraud theory at that time.

[13] The case cited by the Ninth Circuit, *City Solutions Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835 (9th Cir. 2004), is inapposite. The court of appeals cited *City Solutions*,

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to harmonize separately developed but related principles in its jurisprudence governing the district courts' so-called "gatekeeper" function, whereby the district courts permit plausible claims to proceed to successive stages of litigation and eliminate those that that are not legally or factually viable.[14]

First, the Court can expressly extend existing analytical principles applied in prior decisions in antitrust cases under Federal Rule of Civil Procedure 56 concerning the plausibility of claims to all cases, including fraud claims. In addition, by explicitly permitting district courts to use their judicial expe-

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without explanation, as authority for its ruling that the district court's granting summary judgment in this case was "premature." App. 5a. In *City Solutions*, judgment notwithstanding the jury verdict was granted by the district court against a disappointed bidder that claimed that as a result of fraud the winning bidder in a contest obtained an unfair advantage in the bidding process. The disappointed bidder claimed that, but for the fraudulent breach of a promise by the winner, it would have had a successful bid. In that case, the court of appeals identified a mathematical scoring system as a plausible basis for the jury's conclusion that if the winner's unfair advantage was eliminated, the disappointed bidder would have won the contest. *Id.* at 841. As the court of appeals noted, the jury "could do the math." *Id.* That record stands in contrast to the record in this case. A showing that each of the predicted events that would have been necessary for AIG to gain ownership of 100% of the insurance assets would have taken place is the polar opposite of "doing the math," as was possible there.

[14] *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (noting that "[i]n numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment. . . .").

rience and common sense in making this plausibility determination under Rule 56, the Court can harmonize this analysis with that announced in recent decisions under Rule 12(b)(6). Moreover, because the Ninth Circuit's rulings in this case on both Rule 12(b)(6) and Rule 56 issues are unmistakably at odds with prior decisions by this Court, whereas the district court's rulings are not, by reversing the court of appeals this Court can further clarify the importance of the trial courts' gatekeeper role to the administration of justice.

Second, the Court can further address the district courts' authority, in conducting plausibility analyses under Rule 12(b)(6), to refuse, in light of the courts' judicial experience and common sense, to credit allegations in an amended complaint that conflict with allegations in an earlier version of that complaint, where no explanation is proffered for the amendment or the explanation is implausible. In doing so, the Court can resolve an apparent split of authority between the Ninth and Federal Circuits.

The first issue presented concerns the authority of district courts to fulfill their gatekeeper role by bringing to bear their judicial experience and common sense in the assessment of the plausibility of a plaintiff's claims at *both* the Rule 12(b)(6) and Rule 56 stages of a case. The Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), made assessment of the "plausibility" of a claim the touchstone of analysis for district courts ruling on motions to dismiss. Moreover, these decisions establish that the plausibility assessment is to be made in the context of the facts and circumstances of a particular

case, using a district court's "judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

This Court has also held that the plausibility of a claim should be considered in determining whether there is a genuine issue of material fact for trial under Rule 56, at least in the antitrust context. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (evaluating whether antitrust claim was plausible in determining whether issue of material fact existed for purposes of summary judgment); *cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 239-243 (1993) (concluding that motion for judgment as a matter of law under Rule 50 was properly granted where antitrust claims were implausible).[15] The Court has yet to expressly hold, however, that a plausibility analysis is appropriate in determining the propriety of summary judgment outside of the antitrust context, or that a district court may rely on its "judicial experience and common sense" in making plausibility determinations on Rule 56 motions.

The application of a plausibility test to all types of claims in the Rule 56 context would be a significant aid to the administration of justice. Nothing in the text of the Federal Rules of Civil Procedure or in this Court's jurisprudence suggests that a court empowered to assess the plausibility of claims on the pleadings in light of its "judicial experience and common sense" ought to abandon those analytical

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[15] This Court has held that the standards governing determinations under Rule 56 and Rule 50 are in principle identical. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that summary judgment standard under Rule 56 "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)").

tools when considering whether a genuine issue of material fact exists in the context of a motion for summary judgment. Indeed, the exercise of such authority should be considered a fundamental aspect of the district courts' gatekeeper role at the Rule 56 stage just as it is at the Rule 12(b)(6) stage. The Ninth Circuit's determination that the district court's rulings were "premature" is wrong under existing precedent and truncates the authority of district courts to fulfill their proper role. This case presents the Court with the opportunity to so hold, and thus to harmonize the principles governing the district courts' gatekeeper role and to provide further guidance on the district courts' use of judicial experience and common sense in applying the plausibility standard in the context of Rule 56.

Moreover, because this Court's mandates are expected to be followed by the lower courts, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting) ("The Supreme Court of the United States does not sit to announce 'unique' dispositions. Its principal function is to establish *precedent*—that is, to set forth principles of law that every court in America must follow."), the Ninth Circuit's determination on the legal sufficiency of AIG's tortious interference claims under the principles of *Twombly* and *Iqbal* should be summarily reversed, as its decision cannot be reconciled with those precedents and the district court ruling was correct on its face. In litigating these ten-year old claims, Defendants are entitled to have the lower courts apply governing precedent and thereby save them from the substantial cost of years of further litigation.

The second issue presented is whether, in ruling on a motion to dismiss, a district court may refuse to give effect to allegations in an amended complaint that conflict with allegations in a prior complaint where the plaintiff either offers no meaningful explanation for the conflicting amendment or its explanation is implausible. Here, AIG's first complaint stated that it learned of its tortious interference claims outside of the applicable limitations period, which also tracked allegations AIG had made in a verified pleading in prior, related litigation. When AIG, after notice of the defect in its claim and in a move obviously designed to salvage it, changed its complaint to state just the opposite, the district court refused to credit the revised allegation, which was offered without plausible explanation.

The Ninth Circuit's cursory decision reversing this determination on the ground that the district court "prematurely" resolved a contested issue of fact at the motion to dismiss stage (regarding when AIG learned of its claims) raises an important question concerning the authority of district courts under Fed. R. Civ. P. 12(b)(6) to address such conflicting allegations in successive pleadings prior to summary judgment. The Ninth Circuit decision also illuminates a split in the circuits concerning whether and under what circumstances a district court has the authority to strike or disregard a conflicting allegation in an amended complaint and then dismiss that complaint. *Compare PAE Government Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858-59 (9th Cir. 2007) (district court does not have authority under Rule 12 to strike and disregard unexplained conflicting allegations in an amended pleading, but can only do so pursuant to Rule 11), *with Bradley v. Chiron Corp.*, 136 F.3d 1317, 1325-26 (Fed. Cir. 1998) (district court need not

accept and may strike allegations in an amended complaint that contradict without adequate explanation allegations in a prior pleading).

District courts are often confronted at the motion to dismiss stage with amended complaints that contain allegations conflicting with those in a prior complaint. This Court should reverse the Ninth Circuit and hold that the district court has the authority to consider the context of an amended, conflicting allegation and to disregard that allegation where the district court determines, in light of the court's judicial experience and common sense, that the explanation for the departure from the prior complaint is implausible.

I. CERTIORARI IS WARRANTED TO RESOLVE WHETHER A DISTRICT COURT MAY ASSESS THE PLAUSIBILITY OF A CLAIM FOR RELIEF IN LIGHT OF THE COURT'S JUDICIAL EXPERIENCE AND COMMON SENSE WHEN RULING ON A MOTION FOR SUMMARY JUDGMENT AS WELL AS ON A MOTION TO DISMISS

A. Legal Principles Relevant to the Issues Presented

This Court has defined the critical responsibility of the federal district courts to control the federal docket by weeding out non-meritorious claims during pretrial proceedings. In the motion to dismiss context, this Court held in *Twombly,* 550 U.S. at 570, that district courts may grant motions to dismiss where plaintiffs fail to plead "enough facts to state a claim that is plausible on its face," and thus do not "nudge[] their claims across the line from conceivable to plausible . . . ." A district court need not accept as

true a complaint's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"; rather, a claim is facially plausible only where the district court may draw the reasonable inference that defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1949. In *Iqbal*, this Court further explained that a two-pronged approach may be used in evaluating a complaint under the standard set forth in *Twombly*. "A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 129 S. Ct. at 1950. The court should next assess the remaining well-pleaded factual allegations and "determine whether they plausibly give rise to an entitlement to relief." *Id.* As this Court explained, "determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

This Court has likewise established fundamental principles to be followed under Rule 56 in assessing whether there is a genuine issue of material fact for resolution by a trier of fact. Thus, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the Court ruled that there is "no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party," and the mere assertion of a dispute of fact or conflicting inference by the non-moving party does not necessarily present a genuine issue of material fact. Although the evidence must be viewed in the light most favorable to the non-moving party, a court need not credit inferences that are speculative or unreasonable based on the record as a whole. *Matsushita*, 475 U.S. at 587-88 (1986).

In *Matsushita*, an antitrust case, this Court concluded that it follows from the principles governing summary judgment that if a plaintiff's claim is implausible in the factual context of the case, it must identify more persuasive evidence than would otherwise be necessary to defeat summary judgment. 475 U.S. at 587. In addressing whether there was a genuine issue of material fact for trial, the Court in *Matsushita* therefore analyzed whether the plaintiff's antitrust conspiracy claim was plausible in context, and found that it was not. *Id.*; *see also Brooke Group*, 509 U.S. at 243. Although this Court has applied a plausibility analysis under Rule 56 in the antitrust context, it has not expressly held that this analysis is to be used generally in ruling on motions for summary judgment. The Court also has not ruled that a district court may bring to bear its "judicial experience and common sense" in assessing the plausibility of a claim on a motion for summary judgment, as the Court has directed be done in assessing a motion to dismiss under Rule 12(b)(6). The legal gatekeeper role of the district court at each stage is, however, substantially the same. *See, e.g.*, *Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991) ("In essence, the court's inquiry under either 12(b)(6) or 56(c) is identical, with the most significant difference being the type of evidence the court considers in reaching its decision.").

The legal principles underlying the Court's existing Rule 12(b)(6) and Rule 56 jurisprudence have evolved separately but can be seen as harmonious. Having recently elaborated the appropriate standard for judicial inquiry under Rule 12(b)(6), the Court should explicitly harmonize the district court's role and inquiry at the Rule 56 stage with that at the Rule 12(b)(6) stage, and provide that the district court at

both stages may bring to bear its judicial experience and common sense in assessing plausibility.

Recognizing expressly that a context-specific plausibility assessment of a claim should be made at the summary judgment stage based on the record as a whole interpreted using the courts' judicial experience and common sense is particularly important in cases where, as here, the success of the plaintiff's claim turns on a speculative series of factual predictions about what might have happened. Predictions about the outcome of a series of future events, particularly those under the control of third parties, present precisely the type of claim whose plausibility a district court must assess using its judicial experience and common sense in the context of a dispositive motion. Several other federal courts of appeals have ruled that such claims may be timely addressed in the context of pretrial motions.[16] The Ninth

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[16] *See Advanced Resources Int'l., Inc. v. Tri-Star Petroleum Co.*, 4 F.3d 327, 336 (4th Cir. 1993) (concluding that plaintiff's claims that its business reputation would be injured and plaintiff forced to defend itself against future lawsuits as a result of defendant's misrepresentations could not survive summary judgment because alleged injury depended on occurrence of six events, each of which would have had to occur for the plaintiff to have suffered damages; plaintiff's contentions concerning such injury were "simply too speculative and abstract"); *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (concluding that environmental group's claims that government's failure to prepare environmental impact statement on effects of tax credit for fuel additive harmed their interest in the environment could not survive summary judgment because of uncertainty concerning necessary "links" in causal chain and "because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury," including numerous links that presumed independent actions by third parties); *Day v.*

Circuit's contrary ruling that such determinations were "premature" demonstrates that explicit guidance is needed in the summary judgment context.

B. AIG's "Defrauded Bidder" Claim

After considering AIG's defrauded bidder claim on the record as a whole, the district court granted summary judgment in favor of Defendants, concluding that AIG's theory "does not even come close to establishing a genuine issue of material fact as to whether it is reasonably certain that the Commissioner would have selected (or the Rehabilitation Court would have approved) [AIG's] hypothetical non-conforming bid." App. 73a n.26.[17] In so doing,

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Avery, 548 F.2d 1018, 1028 (D.C. Cir. 1977) (affirming summary judgment on plaintiff's claim that he would have prevented merger of his firm had he been informed of it because "although it is not absolutely inconceivable that he could have persuaded his colleagues to [reject the merger], he avers no facts from which such a probability might realistically be inferred"); *see also Oceanic Exploration Co. v. Phillips Petroleum Co.*, 2009 WL 3698085, at **5 (5th Cir. 2009) (affirming district court's dismissal of plaintiff's claims on Rule 12(c) motion (analyzed under standards of Rule 12(b)(6)) because plaintiff's claim that absent bribery it would have bid for and acquired oil and gas rights "fail[ed] the test of common sense plausibility" in context of case in light of series of events that would have had to occur for it to prevail, including actions by third parties over which it had no control). It seems obvious that in resolving these issues, the courts must resort to their judicial experience and common sense.

[17] The California courts have held that a plaintiff must establish both its entitlement to and the extent of lost profit damages to a reasonable certainty. *See S.C. Anderson, Inc. v. Bank of America Nat'l Trust and Savings Ass'n*, 24 Cal. App. 4th 529, 535 (1994) (noting that in a fraud case, "lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent"); *Vu v.*

the court undertook the kind of critical plausibility analysis outlined by this Court in *Matsushita* in the antitrust context. It is equally evident that the district court's judgment in determining what was reasonably certain or probable and what was not, based on the evidence of record, was informed by its judicial experience and common sense. *See Iqbal*, 129 S. Ct. at 1950.

The Ninth Circuit's reversal of the district court's grant of summary judgment to Defendants on AIG's "defrauded bidder" fraud claim underscores the critical need for the Court to formally make a plausibility assessment part of the judicial inquiry in all summary judgment cases. AIG's theory was that if the portage agreements had been disclosed, the Commissioner would have eliminated the Investor Group from participation in the bidding and awarded the entire insurance company to AIG. According to AIG, "the terms of the sale to the [Investor] Group were the best deal available at the time; [AIG] was willing to subscribe to these same terms; there is no evidence that any other party was willing to enter such a deal; and the Commissioner was under substantial pressure to complete the sale quickly with no one buyer ready to proceed quickly except [AIG]." App. 67a.

The record evidence following extensive discovery not only provided no basis for these conclusions and predictions, but contradicted them. Nine separate predicted events would have had to occur for AIG to

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Cal. Commerce Club, Inc., 58 Cal. App. 4th 229, 233-34 (1997) ("Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain.").

have succeeded in acquiring the insurance company,[18] including favorable decisions by third parties over whom AIG had no control, such as the Commissioner, who would have needed to decide that it was in the best interest of the insurance estate to sell the insurance company to AIG, and the Rehabilitation Court, which would have needed to exercise its discretion to approve the sale.[19] Expressly invoking the concept of "plausibility," App. 48a, the district court concluded that AIG's claim failed to present a genuine issue for trial because the evidence AIG adduced was insufficient to allow a reasonable juror to conclude that these nine events would have occurred.

The record shows an unmistakable use of judicial experience and common sense by the district court in ruling on the motions for summary judgment. First, the district court determined that there was no factual basis upon which to conclude that it was plausible that, upon discovery of an alleged fraud involving the winning bidder in a complex, years-long rehabilitation process involving both the junk bonds and the insurance assets, the Commissioner would have simply removed the Investor Group, substituted AIG in its place, and proceeded to sell 100% of the insurance assets to AIG. Far more plausible (because it was based on the Commissioner's own testimony) was that, if he had learned of the alleged fraud in 1993, the Commissioner would not have allowed the insurance transaction to close and he would have

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[18] *See supra* at 7-8.

[19] *See In re Pacific Standard Life Ins. Co. v. Life of America Ins. Co.*, 9 Cal. App. 4th 1197, 1202 (1992) (noting that court overseeing rehabilitation of insurance company has "exclusive authority" under California law to authorize, reject, or prescribe terms for sale).

"sought to rescind the entire transaction," including the prior sale of the junk bonds. (Garamendi Dep. at ER3081.)[20] The Commissioner further explained: "We would have done what we had done before, which is to put it out to a bidding process of some kind so as to obtain maximum value." (Garamendi Dep. at ER3082). The Commissioner testified that his "preferred choice" would have been to negotiate a replacement deal with a bidder who did submit a bid for both the bonds and the insurance company in 1993, the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"). (Garamendi Dep. at ER3058; ER3083-84). As the district court found, the Commissioner "unequivocally testified" that he would only have considered "comprehensive" bids that included both the junk bonds and the insurance company. App. 73a n.26. The Commissioner testified that this deficiency alone in AIG's "draft bid"[21] would have eliminated it from consideration: "I don't know how we would have accepted [AIG's] bid in 1993 because it wasn't comprehensive." App. 73a n.26. The district court also concluded that AIG's unsupported assertion that "there is no evidence that any other party was willing to enter such a deal" was contradicted by the "substantial evidence indicating that numerous parties may have potentially re-entered the bidding in the event the MAAF Group bid was disqualified." App. 67a n.20. Thus, AIG's never-submitted 1993 "draft bid," which by its own admission, like its failed

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[20] "Garamendi Dep." refers to the transcript of the deposition of John Garamendi, the California Insurance Commissioner during the relevant time period. "ER" refers to the excerpts of record in the court of appeals.

[21] AIG conceded that its 1993 bid would not have covered the junk bonds.

1991 bid, would not have covered the toxic junk bond portfolio, provides no factual basis to plausibly conclude that it would have obtained ownership of 100% of the insurance company in a renewed bidding process in 1993.

Taken in light of judicial experience and common sense, requiring AIG's claim to go to a jury with the only record evidence contradicting key necessary elements of its claim would be the equivalent of concluding that a district court must ignore contrary dispositive evidence, a proposition this Court has rejected. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (concluding that district court addressing summary judgment was not required to accept plaintiff's allegations concerning police pursuit in the face of dispositive contradictory evidence from a police chase video); *see also Matsushita*, 475 U.S. at 587; *Iqbal*, 129 S. Ct. at 1950 (concluding that plaintiff's claim failed in light of alternative "more plausible" explanation for facts alleged).

In reversing the district court's grant of summary judgment, the court of appeals failed utterly to consider whether AIG's fraud claim was plausible in light of common sense and judicial experience. Instead, implicit in the court of appeals' cursory analysis and explicit in its ruling is the conclusion that such careful, informed review is impermissible in ruling on a motion for summary judgment. The Ninth Circuit's apparent standard would transform the district court from an informed gatekeeper to a mere bystander, waving on even speculative, implausible claims to proceed to another resource-intensive and expensive stage of litigation. The Court should grant certiorari and hold unequivocally that in ruling on motions for summary judgment,

district courts in the Ninth Circuit and elsewhere are empowered to test the plausibility of claims in light of their judicial experience and common sense in determining whether there is a genuine issue of material fact to be submitted for consideration by the trier of fact.

C. Claims Founded on the Right of First Refusal

The court of appeals' ruling on AIG's belatedly explained "defrauded holder of a right of first refusal" fraud claim further demonstrates the need for analysis of the plausibility of a plaintiff's claims in all cases at the summary judgment stage. In addition, the court of appeals' Rule 12(b)(6) ruling concerning the related interference claims conflicts with this Court's holdings in *Twombly* and *Iqbal*, and is appropriate for summary reversal.[22]

AIG's common theory of recovery on both its interference claims and its "defrauded holder of a right of first refusal" fraud claim was that, if the portage agreements had been disclosed after it had purchased one third of the insurance company but before the Investor Group sold their shares to Artemis, it would have succeeded in purchasing the remaining two thirds of NCLH pursuant to its limited right of first refusal. AIG based its claimed likelihood of acquiring these shares on the following allegations (later proffered as proof):

- "MAAF was an automobile insurer in France, and the [Investor Group] members and their

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[22] These claims are discussed together because they are based on the same theory, and AIG adduced no material evidence after discovery on the claims that differentiated them from the allegations in its amended complaint.

'permitted transferees' under the Stockholders Agreement were not as logical long-term owners of the shares of the restructured insurance business as a life insurer based in California such as [AIG]." App. 101a.

- "In the Stockholders Agreement, [AIG] bargained for a right of first refusal in connection with offers by the members of the [Investor Group] to sell all their stock in New California to third parties." App. 101a.
- "A person would lose its status as one of the [Investor Group] members' 'permitted transferees' unless such person acquired the New California stock within one year after the closing date." App. 101a.

None of these allegations plausibly suggests that the other investors in NCLH would have sold their shares to AIG. As the district court noted, the other investors could have elected to hold their shares, and AIG "could never have compelled" them to sell. App. 81a. In addition, whether MAAF or any of the other investors was a "logical" owner of the shares had no bearing on their right to hold them, and AIG's limited right of first refusal gave it no right to force a sale of the shares. Likewise, the expiration of the Permitted Transferee provision would have had no impact on the ability of the other investors to hold the shares. Moreover, the members of the Investor Group could have sold their NCLH shares to any of their affiliates without triggering AIG's limited right of first refusal, and the other original investors had rights equal to AIG under the limited right of first refusal provisions to compete to purchase shares that might be offered for sale by a member of the Investor Group. Finally, even if there were interest in exploring a potential

sale to AIG, it would require more speculation to assume that the parties would have agreed upon price and other sale terms.[23] *See, e.g.*, *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) ("There is no way to know what the terms of the eventual sale would have been – or even if a deal would have been reached.").

In sum, dismissal of AIG's tortious interference claims was unquestionably mandated under this Court's precedents as elaborated in *Twombly* and *Iqbal*, thus warranting certiorari and summary reversal of the court of appeals' contrary ruling. *City of Los Angeles v. David*, 538 U.S. 715, 716 (2003) (granting certiorari and summarily reversing where Ninth Circuit's judgment was "contrary to well-settled principles of constitutional law"); S. Ct. R. 16(1) (noting that Court will enter appropriate order following briefing on petition for certiorari, which "may be a summary disposition on the merits").

In opposing summary judgment on its "defrauded holder of a right of first refusal" fraud claim, AIG proffered nothing more in support of this claim than it had alleged in support of its interference claims at the motion to dismiss stage. Considering the claim in the factual context in which it was presented, the district court correctly concluded that there simply was no evidentiary basis for a plausible conclusion that the members of the Investor Group would have elected to sell their shares to AIG. App. 84a. The reasons certiorari review is warranted in connection

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[23] AIG's implicit contention that it would have reached mutually agreeable terms with the members of the Investor Group is belied by the subsequent factual record. In 1996, Artemis did offer to sell its NCLH holdings to AIG, but AIG rejected the terms of the offer.

with the Ninth Circuit's ruling on AIG's defrauded bidder claim apply with equal force to the court's ruling on AIG's defrauded holder of a right of first refusal claim.

II. CERTIORARI IS WARRANTED TO RESOLVE WHETHER A DISTRICT COURT, IN CONDUCTING A PLAUSIBILITY ANALYSIS UNDER RULE 12(B)(6), MAY, IN LIGHT OF THE COURT'S JUDICIAL EXPERIENCE AND COMMON SENSE, DECLINE TO CREDIT ALLEGATIONS IN AN AMENDED COMPLAINT THAT CONFLICT WITH ALLEGATIONS IN A PRIOR COMPLAINT WHERE NO EXPLANATION IS PROFFERED FOR SUCH AMENDMENTS OR THE EXPLANATION IS IMPLAUSIBLE

The court of appeals ruled that the district court "prematurely" resolved issues of fact by refusing to credit AIG's reversal of its factual allegations regarding when it learned of its claims. Coming after it was notified of the legal deficiency in its Complaint, common sense dictates that, in the absence of an otherwise plausible explanation, AIG reversed its position to save its claims from dismissal under the applicable statute of limitations. The court of appeals' ruling that the district court should ignore the obvious contravenes the principles underlying this Court's teachings in *Twombly* and *Iqbal* concerning the district court's authority in addressing motions to dismiss under Rule 12(b)(6). This Court should grant certiorari to resolve whether a district court under Rule 12(b)(6) has authority to examine, in light of the court's judicial experience and common sense, allegations in an amended complaint that

conflict with allegations in a prior complaint and refuse to give effect to such conflicting allegations where the plaintiff offers either no explanation for the amendment or an implausible explanation.

Iqbal and *Twombly* hold that a district court ruling on a motion to dismiss pursuant to Rule 12(b)(6) must assess the plausibility of allegations in a complaint in the context of the case using its judicial experience and common sense. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 570. It follows that when considering a Rule 12(b)(6) motion to dismiss an amended complaint that contains allegations materially conflicting with a prior complaint, a district court may consider the context in which such conflicting allegations are presented, which necessarily includes the prior pleading and the apparent purpose of the amendment. Thus, for example, where the evident purpose and effect of an amendment is to prevent dismissal of the complaint on statute of limitations grounds, a district court need not view the amendment in a vacuum, but should be able to consider that context and whether the explanation proffered for the amendment is plausible, in determining whether to credit the modified allegations in ruling on a motion to dismiss.

The district court in this case acted in accordance with these principles. In ruling on Defendants' motions to dismiss on statute of limitations grounds, the court evaluated AIG's amended allegations concerning when it learned of its claims in the context of the allegations in its prior complaint, and considered AIG's explanation for the change. AIG alleged in its initial complaint that it "did not learn of [its claims] . . . before the period on or around late 1998 or early 1999, shortly *before* the California Fraud Action,"

which was more than two years before tolling agreements were signed with Defendants. App. 99a (emphasis added).[24] Following a meet and confer among counsel concerning the impending filing of Defendants' motion to dismiss, AIG clearly recognized that its allegation was fatal to its claims. AIG thus amended its Complaint to assert that it did not learn of its claims "until some time *after* it entered into tolling agreements" with Defendants. App. 100a (emphasis added). AIG's explanation for the amendment was that there was no conflict between the original and amended complaints because stating that it did not learn of its claims "before the California Fraud Action was filed" did not imply that it learned of them before or when that action was filed. *See* AIG's Consolidated Opposition to All Defendants' Motions to Dismiss Complaint 47.

In considering the motion to dismiss on statute of limitations grounds, the district court declined to give effect to AIG's attempt essentially to have "before" mean "after." The court therefore granted the motions to dismiss the interference claims on statute of limitations grounds, among others.

Despite the absence of clear guidance concerning their authority under Rule 12(b)(6) to do so, other district courts in ruling on motions to dismiss also

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[24] As Defendants noted in their motions to dismiss, AIG's initial allegation was consistent with statements in AIG's Verified Complaint in Intervention filed in the prior action commenced by the Commissioner, which was properly subject to judicial notice. AIG alleged in its Verified Complaint in Intervention that it "did not discover the alleged existence of the [portage agreements] or any other wrongful conduct that is alleged in the [Commissioner's] Third Amended Complaint until the early part of 1999." ER141.

have refused to give effect to allegations in an amended complaint that conflict, without explanation, with allegations in a prior complaint. *See, e.g.*, *Wallace v. New York City Dept. Corrs.*, 1996 WL 586797, at *2 (E.D.N.Y. 1996) ("The plaintiff blatantly changes his statement of the facts in order to respond to the defendants' motion to dismiss. In this amended complaint, the plaintiff directly contradicts the facts set forth in his original complaint. This court accepts the facts as described in the original complaint as true and concludes that plaintiff has failed to meet [the liability requirements for its claim]."); *Ageloff v. Kiley*, 318 F. Supp. 2d 1157, 1159 (S.D. Fla. 2004) (where plaintiff sought to amend complaint to avoid statute of limitations problem, district court would "accept as true the dates alleged in the initial Complaint" and dismiss amended complaint notwithstanding changed dates therein).

The Ninth Circuit reversed the district court's dismissal, concluding that the court prematurely resolved a contested issue of fact regarding when AIG learned of its claims. In determining that the district court did not have authority under Rule 12(b)(6) to disregard AIG's conflicting, amended allegation, the Ninth Circuit implicitly followed its prior decision in *PAE Gov't Servs. v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007), which reversed a district court ruling that had struck as "false and sham" allegations in an amended complaint that conflicted with allegations in an earlier pleading. According to Judge Kozinski, writing for the court in *PAE*, Rule 12 did not authorize district courts to strike and disregard such allegations; such authority could only be found in Rule 11 on the basis of bad faith pleading. *Id.* 859-60.

The Federal Circuit decision in *Bradley v. Chiron Corp.*, 136 F.3d 1317 (Fed. Cir. 1998) conflicts with the Ninth Circuit decision in *PAE*. In *Bradley*, the Federal Circuit concluded that a district court is not required to accept allegations in an amended complaint that conflict with those in a prior complaint, and may strike them "as false and sham" where circumstances so warrant and dismiss the complaint. *Id.* at 1325-26. In affirming the district court's decision to strike allegations in an amended pleading and dismiss the complaint, the Federal Circuit observed that "the allegations [in the amended complaint] were changed in material ways that were not adequately explained" and that "exceeded permissible adjustments of factual allegations." *Id.* at 1325.

This Court should grant certiorari in this case to establish the district court's authority to address conflicting allegations in successive pleadings when ruling on a motion to dismiss under Rule 12(b)(6), and to resolve this apparent split in circuit authority. The Court should hold that in ruling on a motion to dismiss an amended complaint, a district court may examine in context allegations in the amended complaint that conflict with allegations in a prior complaint and refuse to give effect to such conflicting allegations where the plaintiff either offers no explanation for the amendment or the explanation is implausible in light of the court's judicial experience and common sense. Recognizing such authority is consistent with and in furtherance of the animating principles of *Iqbal* and *Twombly* regarding the proper role and authority of the district court under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE B. FRIEDMAN
AVRAM LUFT
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Counsel for Petitioners Crédit Lyonnais S.A.

JOHN E. SCHREIBER
DEWEY & LEBOEUF LLP
333 South Grand Ave.
Suite 2600
Los Angeles, CA 90071
(213) 621-6000

Counsel for Petitioners Artemis S.A., Artemis Finance S.N.C., and Aurora S.A.

GEORGE J. TERWILLIGER III
Counsel of Record
DARRYL S. LEW
WHITE & CASE LLP
701 13th Street N.W.
Washington, D.C. 20005
(202) 626-3600
gterwilliger@whitecase.com

Counsel for Petitioners Consortium de Réalisation and CDR-Enterprises

June 24, 2010

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Feb 09 2010]

Nos. 07-56019
D.C. No. 2:05-cv-01035-JFW

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.
Plaintiff-Appellant,

v.

ALTUS FINANCE S.A., a corporation
organized under French law,
Defendant,

and

AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C., an entity doing business under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,
Defendants-Appellees.

No. 07-56679
D.C. No. 2:05-cv-01035-JFW

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.
Plaintiff-Appellant,

v.

ALTUS FINANCE S.A., A CORPORATION ORGANIZED UNDER FRENCH LAW, AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C., an entity doing business under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,

Defendants-Appellees.

Appeal from the United States District Court for
the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted September 3, 2009
Pasadena, California

MEMORANDUM *

Before: FISHER and GOULD, *Circuit Judges*, and ENGLAND, *District Judge*.**

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

Plaintiff AIG Retirement Services, Inc. ("AIG"), timely appeals from the district court's grant of Defendants' motions to dismiss and motions for summary judgment. We have jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.

"We review de novo the district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002) (internal citations omitted). Nevertheless, "we may affirm the district court's dismissal on any ground supported by the record." *Gemtel Corp. v. Cmty. Redevelopment Agency*, 23 F.3d 1542, 1546 (9th Cir. 1994) (internal citations omitted). We also review de novo the district court's grant of summary judgment. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

First, the district court prematurely dismissed AIG's breach of the implied covenant of good faith and fair dealing claim. AIG adequately alleged that even though the MAAF Defendants transferred their New California shares to a "permitted transferee" under the Stockholders Agreement, because Defendants knew Artemis could only fraudulently and unlawfully obtain regulatory approval to hold those shares, the transfer nevertheless circumvented AIG's contractual right of first refusal. Since the implied covenant has been recognized as requiring that contractual duties be performed consistently with applicable laws and regulations, *Koval v. Peoples*, 431 A.2d 1284, 1286 (Del. Super. Ct. 1981), and in good faith, *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 442 (Del. 2005), AIG adequately stated a claim for breach of the implied covenant. Defendants' argument that AIG's damages are unduly speculative is similarly premature. *Cf. Truitt v. Fahey*, 52 A. 339

(Del. Super. Ct. 1902) (finding damages speculative after trial). Thus, the district court's dismissal of AIG's breach of the implied covenant claim is reversed.

Likewise, the district court prematurely granted Defendants' motions for summary judgment as to AIG's fraud claim. AIG relied on three distinct theories in pursuit of its instant claim: 1) "defrauded bidder," 2) "defrauded purchaser," and 3) "defrauded holder of a right of first refusal." Although the district court properly rejected AIG's "defrauded purchaser" claim, the law and the undisputed facts favor denial of summary judgment as to AIG's remaining theories.

As a threshold matter, AIG contends that the district court erred when it excluded the testimony of AIG's expert witness, Karl L. Rubinstein, former counsel to the California Insurance Commissioner. We review the district court's decision for an abuse of discretion, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997), and find no such abuse here. The district court acted well within its authority when it determined that AIG's proffered evidence was inherently unreliable. *See* Fed. R. Evid. 702(2) (requiring the use of "reliable principles and methods"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (looking to whether an expert's method has "general acceptance" in a "relevant expert community"). Thus, the district court's exclusion of the testimony of AIG's expert witness is affirmed.

On the merits, the district court improperly determined that the damages sought under Plaintiff's "defrauded bidder" claim were governed by California Civil Code § 3343. Section 3343 articulates the available damages for "[o]ne defrauded in the purchase, sale or exchange of property." However, AIG was allegedly defrauded, not into a purchase or sale

governed by § 3343, but instead into entering a joint bid with Defendants, a venture AIG alleges it never would have undertaken but for Defendants' false statements as to, *inter alia*, Defendants' own identities and owners. *See City Solutions Inc., v. Clear Channel Communications, Inc.*, 365 F.3d 835, 839 (9th Cir. 2004).

Moreover, any attempt by Defendants to characterize their fraud as one intended to induce AIG to purchase New California is not well taken because AIG's purchase of its New California shares was merely incidental to the actual goal of Defendant's underlying fraud, which was to induce AIG to join Defendant's bid. Stated another way, at its most basic, the substantive fraud, as alleged in this case, occurred when Defendants induced Plaintiff to join their bid, and all subsequent actions were consequences of that decision, logical steps taken in the furtherance of the original fraud in the bidding. Accordingly, AIG's damages under its instant fraud theory are governed by California's general fraud provision, Civil Code § 3333, which permits the recovery of lost profits.

Despite the possible existence of many alleged contingencies, the occurrence of which Defendants argue AIG would be called upon to prove at trial, the district court also erred when it prematurely determined that AIG's sought-after damages were impermissibly speculative. *See City Solutions*, 365 F.3d at 841. The district court similarly erred when it treated AIG's admissions as to justifiable reliance, or lack thereof, as conclusive. *See, e.g., Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (quoting *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir. 1929)). Thus, triable

issues of fact remain as to AIG's ability to prove its damages to a reasonable certainty and as to whether AIG justifiably relied on Defendants' fraud. The district court erred in holding to the contrary, and its grant of summary judgment as to AIG's "defrauded bidder" fraud claim is reversed. For the same reasons, the district court's grant of summary judgment as to AIG's "defrauded holder of a right of first refusal" theory is reversed and remanded as well.

Nevertheless, the district court properly rejected AIG's "defrauded purchaser" theory because AIG lacks standing to bring what is in actuality a derivative claim. *See Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 106 (1969) ("[T]he action is derivative . . . if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders . . . .") (internal citations and quotations omitted). Accordingly, the district court's grant of Defendants' motions for summary judgment as to Plaintiff's fraud claim is reversed as to the "defrauded bidder" and "defrauded holder of a right of first refusal" claims and is affirmed as to AIG's "defrauded purchaser" claim.

The district court also properly rejected AIG's unjust enrichment remedy because, in light of the above reversals of AIG's breach of contract and fraud claims, recovery under an unjust enrichment theory is prohibited as duplicative. *See Ramona Manor Convalescent Hosp. v. Care Enterprises*, 225 Cal. Rptr. 120, 130-31 (Cal. Ct. App. 1986); *see also Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (citing *Wal-Noon Corp. v. Hill*, 119 Cal. Rptr. 646, 651 (Ca. Ct. App. 1975)).

With regard to the last substantive claims, the district court prematurely dismissed AIG's interference with contract and with prospective economic advantage claims by resolving several contested factual issues on the pleadings.[1] Specifically, the district court improperly concluded that: 1) AIG had admitted in earlier pleadings to having actual knowledge of its interference claims prior to entering the tolling agreements, 2) AIG was on inquiry notice of its interference claims prior to entering those agreements, and 3) AIG's sought-after damages were impermissibly speculative. Accordingly, the district court's dismissal of Plaintiff's interference claims is reversed and remanded.

Finally, in light of the reversal of AIG's interference claims, the Artemis Defendants are no longer prevailing parties under the fee provision of the Stockholders Agreement. Moreover, even if the Artemis Defendants were prevailing parties, the contract language providing for fees to be awarded "[i]n any suit to enforce the provisions" of the Agreement is simply too narrow to encompass fees incurred as a result of the claims brought by Plaintiff here. Thus, the district court's award of attorneys' fees is also reversed. Each party shall bear its own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

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[1] Because the district court's dismissal of Plaintiff's breach of implied covenant claim is reversed, there is no need to address Defendants' argument that the inference with contract claim fails with the underlying contract claim.

AIG Retirement Services, Inc. v. Altus Finance S.A., No. 07-56019+

RAYMOND C. FISHER, Circuit Judge, concurring in part, dissenting in part.

Although I join most of the disposition in this case, I respectfully disagree with my colleagues' conclusions concerning AIG's "defrauded holder of a right of first refusal" and unjust enrichment claims. I believe AIG cannot recover under its defrauded holder theory and can maintain a separate claim for unjust enrichment.

I.

The majority treats the "defrauded holder of a right of first refusal" claim as functionally identical to the "defrauded bidder" claim, reinstating the former "[f]or the same reasons" that it reinstated the latter. This cursory discussion overlooks the factual basis of the defrauded holder claim, which has nothing to do with a bidding process. California Civil Code section 3343 applies to the defrauded holder claim. Consequently I would hold that summary judgment was warranted because AIG could not recover damages.

California Civil Code section 3343 severely limits the availability of lost profits damages to "[o]ne defrauded in the purchase, sale or exchange of property." Cal. Civ. Code § 3343(a)(4). *City Solutions Inc. v. Clear Channel Communications, Inc.* (*City Solutions II*), cited by the majority, excludes bidding processes from "purchase, sale or exchange." 365 F.3d 835, 839 (9th Cir. 2004). The transaction at the core of the defrauded holder claim, however, is the sale of two-thirds of the New California Holdings Corporation. AIG claims that it would have been able to purchase this equity but for defendants' fraud. The majority

does not explain how this claim is the "same" as a claim arising out of a joint bid.

The California Court of Appeal's decision in *Kenly v. Ukegawa* demonstrates why section 3343 applies to the defrauded holder claim. 19 Cal. Rptr. 2d 771, 773 (Ct. App. 1993). The court explained, "An examination of the language of section 3343 supports the conclusion that [a defrauded party] is not entitled to lost profits on a property he never acquired" because even though the property was never acquired, it is still the subject of a proposed purchase, sale or exchange. *Id.* at 775. The majority has made no attempt to distinguish *Kenly* from AIG's claim to have been defrauded out of a right to acquire the two-thirds of New California held by the MAAF defendants, nor could it successfully do so.

II.

The majority holds that AIG's equitable claim of unjust enrichment is prohibited as duplicative. Again, I respectfully disagree. An unjust enrichment theory is not necessarily duplicative of AIG's surviving legal claims, and AIG is permitted to plead alternative theories of relief. Therefore, I would reverse the district court's summary judgment on the unjust enrichment claim.

"The right to maintain an action for restitution . . . is largely the product of imperfections in the tort remedies." *Ramona Manor Convalescent Hospital v. Care Enterprises*, 226 Cal. Rptr. 120, 130 (Ct. App. 1986) (quoting Restatement (First) of Restitution § 3 cmt. a (1937) (emphasis removed)). As just one example, because California has statutorily limited damages in fraud actions concerning the purchase of property, should AIG prove its defrauded holder allegations, it

may turn to equity to prevent "unjust retention of the benefit" of the fraud. *See, e.g., Lectrodryer v. SeoulBank*, 91 Cal. Rptr. 2d 881, 883 (Ct. App. 2000). Unjust enrichment provides an additional method of recovery for a plaintiff who proves a bad act but has no remedy at law. As we vacate and remand substantial portions of this case for further proceedings, the majority's assumption that AIG will have an adequate remedy at law is premature.

The majority cites to two cases, both of which are inapposite. In *Ramona Manor*, the California Court of Appeal held that a claim of equitable restitution does not authorize double recovery. 225 Cal. Rptr. at 129-30. However, the bar on double-recovery does not come into play until a party has successfully proven a legal theory at trial. *See id.* at 1138. We cannot assume that AIG will succeed on any of its legal claims; AIG has a long road between our ruling and a favorable verdict. In *Paracor Finance, Inc. v. General Electric Capital Corp.*, we held that an unjust enrichment claim "does not lie when an enforceable, binding agreement exists defining the rights of the parties." 96 F.3d 1151, 1167 (9th Cir. 1996) (citing, *inter alia*, *Wal-Noon Corp. v. Hill*, 119 Cal. Rptr. 646, 650-51 (Ct. App. 1975)). Although the shareholder agreement governed the relationship between AIG and the MAAF defendants, there was no "binding agreement" with the Altus and Artemis defendants. Therefore AIG may still assert an equitable claim concerning its indirect dealings with Altus and Artemis.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Mar 26 2010]

No. 07-56019
D.C. No. CV-05-01035-JFW
Central District of California,
Los Angeles

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.,
Planitiff-Appellant,

v.

ALTUS FINANCE S.A., a corporation organized under French Law
Defendant,

and

AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C., an entity doing business under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,
Defendant-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56019
D.C. No. CV-05-01035-JFW
Central District of California,
Los Angeles

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.,
Planitiff-Appellant,

v.

AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C., an entity doing business under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,
Defendant-Appellees.

ORDER

Before: FISHER and GOULD, Circuit Judges, and ENGLAND, District Judge.*

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* The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

The joint Petition for Rehearing filed by Consortium de Realisation, CDR-Entreprises, and Credit Lyonnais S.A., ("CDR Appellees") is Denied. The joint Petition for Rehearing filed by Artemis S.A., Artemis Finance S.N.C., Aurora S.A., MAAF Assurances, and MAAF Vie S.A., ("MAAF Appellees") is DENIED.

The full court has been advised of both the CDR Appellees' Petition for Rehearing En Banc and the MAAF Appellees' Petition for Rehearing En Banc. No judge of the court has requested a vote on either Petition for Rehearing En Banc. Fed. R. App. P. 35. The CDR Appellees' Petition for Rehearing En Banc and the MAAF Appellees' Petition for Rehearing En Banc are DENIED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Apr 06 2010]

No. 07-56019
D.C. No. CV-05-01035-JFW
Central District of California,
Los Angeles

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.,
Plaintiff-Appellant,

v.

ALTUS FINANCE S.A., a corporation organized under French Law
Defendant,

and

AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C. an entity doing business under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF VIE S.A., a corporation organized under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,
Defendant-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Apr 06 2010]

No. 07-56019
D.C. No. CV-05-01035-JFW
Central District of California,
Los Angeles

AIG RETIREMENT SERVICES, INC.,
f/k/a SUNAMERICA, INC.,
Planitiff-Appellant,

v.

ALTUS FINANCE S.A., a corporation organized under French law; AURORA S.A., a corporation organized under French law; ARTEMIS S.A., a corporation organized under French law; ARTEMIS FINANCE S.N.C. an entity doing business under French law; CDR ENTERPRISES, a corporation organized under French law; CONSORTIUM DE REALISATION S.A., a corporation organized under French law; MAAF ASSURANCES, a mutual insurer organized under French law; MAAF VIE S.A., a corporation organized under French law; CREDIT LYONNAIS S.A., a corporation organized under French law,

Defendants-Appellees.

ORDER

Before: FISHER and GOULD, Circuit Judges, and ENGLAND, District Judge.[1]

Appellees' amended motion to stay the mandate pending filing of a petition for certiorari, filed April 2, 2010, is **GRANTED**. The mandate shall be stayed for 90 days from the filing date of this order. The parties are to advise the court of any change in status.

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[1] The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).]

Case No. CV 05-1035-JFW (CWx)

Date: February 28, 2006

Title: AIG RETIREMENT SERVICES, INC. -v- ALTUS FINANCE S.A., et al.

[Entered Mar 1, 2006]

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	None Present
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANT;

None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS MAAF ASSURANCES AND MAAF VIE, S.A.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) AND RULE 9(b) [filed 11/16/05; Docket No. 73]; GRANTING IN PART AND DENYING IN PART DEFEN-

DANTS ARTEMIS S.A., ARTEMIS FINANCE S.N.C. AND AURORA S.A.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT [filed 11/16/05 Docket No. 78]; AND GRANTING IN PART AND DENYING IN PART DEFENDANTS CREDIT LYONNAIS S.A., CONSORTIUM DE REALISATION S.A., AND CD ENTERPRISES' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT OF AIG RETIREMENT SERVICES, INC. [filed 11/16/05; Docket No. 84]

On November 16, 2005, Defendants MAAF Assurances and MAAF Vie, S.A. (collectively "MAAF Defendants"), Defendants Artemis S.A., Artemis Finance S.N.C., and Aurora S.A. (collectively "Artemis Defendants"), and Defendants Credit Lyonnais S.A., Consortium de Realisation S.A., and CDR Enterprises (collectively "CL Defendants") filed Motions to Dismiss the Second Amended Complaint (collectively "Defendants' Motions"). On December 22, 2005, Plaintiff AIG Retirement Services, Inc. filed, with the Court's permission, a Consolidated Opposition to the Defendants' Motions. On January 17, 2006, Defendants filed their Replies. The Motions came on regularly for hearing on January 30, 2006. After hearing oral argument on the Motions, the Court took the matters under submission. After reviewing the moving, opposing, and reply papers and hearing oral argument, the Court rules as follows:

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff filed its Complaint on February 9, 2005 ("Complaint") and on September 6, 2005, Plaintiff filed an Amended Complaint. On November 2, 2005, pursuant to the Court's order, based on the stipula-

tion of the parties, Plaintiff filed a Second Amended Complaint ("SAC") which alleged the following causes of action: (1) fraud and deceit, (2) breach of contract, (3) interference with contract, (4) interference with prospective economic advantage.[1] Defendants move to dismiss all four of Plaintiff's causes of action.

After almost a decade of litigation, and at least a half-dozen published opinions, involving every aspect of this action, the facts are well known to all parties and will not be repeated here except where relevant to the Court's analysis of the issues presented in Defendants' Motions.

II. LEGAL STANDARD

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Accordingly, "[a] Rule 12(b)(6) dismissal is proper only where there is either a lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory." *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a

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[1] It is unclear why Plaintiff styled its claims for relief as "causes of action" because this action was originally filed in this Court, and is not here by way of removal. To avoid confusion the Court, will refer to Plaintiff's claims for relief as "causes of action."

court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

III. DISCUSSION

A. Plaintiff Has Sufficiently Alleged its First Cause of Action for Fraud

Plaintiff's first cause of action is for fraud and deceit against the CL Defendants, the MAAF Defendants and the Artemis Defendants (collectively "Defendants"). The gravamen of this cause of action is that the Defendants made false and misleading statements and concealed material facts regarding the ownership and control of shares in New California during negotiations with Plaintiff in connection with Plaintiff's acquisition of a minority interest in New California. Plaintiff's Opposition to Defendants'

Motions ("Opp.") p.12:Ins. 20-23. *See, e.g.*, SAC ¶ 33 ("MAAF intentionally made material misstatements and omissions, directly or indirectly, to . . . [Plaintiff] that MAAF Vie was to be the true owner of the shares of New California . . . Defendants deliberately failed to disclose that Altus and Credit Lyonnais would in fact control MAAF's shares."), *id.* at ¶ 41 ("[T]he Artemis Defendants joined the conspiracy with the intent to conceal the fraudulent scheme that had occurred and the true majority ownership and control of the shares in the new insurance business that became New California from . . . any bidders for ELIC's insurance business such as [Plaintiff]"), *Id.* at ¶ 49 ("Defendants, directly or indirectly, made statements to [Plaintiff] that . . . misled [Plaintiff] about the true ownership and control of the share in New California."). *See also id.* at ¶ 66.

Plaintiff specifically alleges that its officers and representatives negotiated the purchase of a minority interest in New California with members of the Apollo Investor Group, attorneys and other representatives who appeared to be acting on behalf of the MAAF Syndicate[2] but in reality were acting on behalf of the Credit Lyonnais Defendants and at no point in the negotiations did any of these representatives reveal the *contrats de portage* or that parties other than the MAAF Syndicate owned and controlled the New California shares. *Id.* at ¶¶ 48, 50. Plaintiff also alleges that at Defendants' behest, on June 23, 1993,

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[2] Although Plaintiff does not define the "MAAF Syndicate" in its SAC, the Court is aware that Plaintiff contends that the MAAF Syndicate is the group of investors that owned New California shares. The MAAF Defendants object to this characterization as conclusory and lacking in factual support. *See* MAAF Defendants Motion p. 6, n. 2.

attorney Alvin G. Segel gave Plaintiff's representative a list of New California's shareholders, and falsely represented that "all of the listed shareholders were members of the MAAF Syndicate, that they were the only shareholders of New California, and that there were no outstanding rights to acquire any shares of stock of New California." *Id.* at 50. Additionally, Plaintiff alleges that the June 10, 1993 Subscription Agreement and the September 3, 1993 Stockholders Agreement misrepresented the true owners of the New California shares. *Id.*

Finally, Plaintiff alleges that Artemis knew of the *contrats de portage* and the past misrepresentations and omissions of the other Defendants and intended to conceal this information, Artemis made false statements and omission to obtain Department of Insurance approval to transfer the MAAF Syndicate's shares in New California, and Artemis knew that it would have to continue to make false representations to conceal the true ownership of the MAAF Syndicate's shares in New California. *Id.* at ¶¶ 43, 50.

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The heightened pleading requirements of Rule 9(b) are designed "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). In order to provide this required notice, "the complaint must specify such facts as the times, dates, places, and benefits received, and other details of the alleged fraudulent activity." *Id.* at 672. Further, "a pleader must identify

the individual who made the alleged representation and the content of the alleged representation." *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1094 (C.D. Cal. 1999).

Although Plaintiff's first cause of action barely satisfies Fed. R. Civ. P. 9(b), under the circumstances of this case, it is sufficient to advise Defendants of the "particular misconduct which is alleged to constitute the fraud" and the resulting damages claimed by Plaintiff. *Neubronner v. Milken*, 6 F.3d at 671. After almost a decade of defending these same allegations in related cases before Judge Matz, including a *nine* week jury trial in *Garamendi v. Altus Finance, S.A., et al.*, U.S. District Court Case No. CV 99-2829 AHM(CWx), the Defendants are well aware of the "who what, when, where, and how" of the fraud alleged by Plaintiff, as well as the damages claimed by Plaintiff as a result of that fraud.[3] Moreover, to the extent there exists any information that is not already known to Defendants, they will have ample opportunity to conduct discovery and develop those facts.

For all of the foregoing reasons, the Court concludes that Plaintiff has adequately stated its first cause of action for fraud and deceit as required by Fed. R. Civ. P. 9(b).[4]

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[3] *See* Judge Matz' extensive findings of fact relating to substantially similar fraud allegations in Fed. R. Civ. P. 52 Findings of Fact and Conclusions of Law re Restitution filed November 21, 2005, Findings of Fact ¶¶ 30-41. *See also* Revised Final Pre-Trial Conference Order lodged February 10, 2005, Jury Verdict Forms filed May 10, 2005, Post-Verdict Order filed June 10, 2005, Order re Punitive Damages filed October 3, 2005.

[4] Although the Court has considered the other grounds raised by Defendants' Motions, the Court concludes that those grounds,

B. Plaintiff Has Failed to State a Breach of Contract Claim and Has Failed to Allege Sufficient Facts to State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff's second cause of action is for breach of contract and breach of the implied covenant of good faith and fair dealing against MAAF Vie and the CL Defendants.[5] Plaintiff alleges that "[t]he members of the MAAF Syndicate, or, alternatively, Altus or Credit Lyonnais breached the Stockholders Agreement because the secret *contrats de portage* operated as a transfer of ownership and control of the MAAF Syndicate's shares in New California to Altus and therefore Credit Lyonnais." SAC ¶ 72. Additionally, Plaintiff alleges that "the members of the MAAF Syndicate, Altus, and Credit Lyonnais violated the Stockholders Agreement and/or covenant of good faith and fair dealing implied therein, on the ground that the members of the MAAF Syndicate transferred the shares nominally held by them to Artemis pursuant to Artemis obtaining DOI approval of the

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including the absence of proximate cause and their attack on Plaintiff's damage theory, are more appropriately resolved in a Motion for Summary Judgment.

[6] Although Plaintiff has pled breach of contract and breach of the implied covenant of good faith and fair dealing as one cause of action, they are really two separate claims, one for breach of the express terms of the Stockholders Agreement and one for breach of the implied covenant of good faith and fair dealing which is made part of the Stockholders Agreement by operation of law. *See Gilbert v. El Paso Co.* 490 A.2d 1050, 1054 (Del. Ch. 1984) (citing 5 Williston, Contracts § 670 (3rd Ed. 1969)) ("An implied covenant of good faith and fair dealings is engrafted upon every contract."). The Court considers these two claims separately.

transfer through fraudulent means in furtherance of the illicit conspiracy." *Id.* at ¶ 73.

1. Defendants Did Not Breach the Express Terms of the Stockholders Agreement

The parties agree that Delaware law applies to this cause of action. The elements of a breach of contract claim are well known and require little discussion; to state a claim for breach of contract under Delaware law, Plaintiff must allege "the existence of [a] contract . . .; the breach of an obligation imposed by that contract; and . . . resultant damage to the plaintiff." *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

a. The CL Defendants Can Be Liable as Signatories to the Agreement under an Agency Theory

Plaintiff contends that the CL Defendants can be liable for breach of the Stockholders Agreement ("Agreement") based on an agency theory. The CL Defendants argue that they cannot be liable as signatories to the Agreement because they did not sign the Agreement and because Plaintiff has failed to plead facts sufficient to establish the CL Defendants liability based on an agency theory.

> Under an agency theory, a Court may attribute the actions of a subsidiary company to a parent where the subsidiary acts at the parent's discretion or on the parent's behalf. This is not limited solely to a parent-subsidiary relationship. The pure agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside

> of the limited agency setting. When applying an agency theory, the Court should focus its inquiry on the arrangement between the corporations, the authority given in the arrangement, and the relevance of that arrangement to the Plaintiffs' claim.

Eisenmann Corp. v. General Motors Corp., 2000 WL 140781, *12 (Del. Super. Ct. 2000). *See also Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1035 (Del. 2003) (quoting *Eisenmann*).

In support of its agency theory, Plaintiff alleges that the MAAF Defendants and the CL Defendants agreed that MAAF Vie would acquire a majority interest in New California on behalf of the CL Defendants, who would own and control MAAF Vie's shares in New California. The MAAF Defendants and the CL Defendants entered into the *contrats de portage* to formalize this agreement. *See, e.g.*, SAC ¶¶ 19, 32, 37, 72.

Plaintiff has sufficiently alleged an agency relationship between the MAAF Defendants and the CL Defendants, which relationship was allegedly designed to allow the CL Defendants to own and control shares in New California that it could not otherwise own or control. The CL Defendants ownership and control of the New California shares is at the core of all of Plaintiff's causes of action, including its breach of contract cause of action. Plaintiff has sufficiently pled an agency theory such that the CL Defendants may be liable for breach of contract as signatories to the Agreement.

b. Neither MAAF Vie Nor the CL Defendants Breached the Express Terms of the Agreement

Defendant MAAF Vie argues that Plaintiff cannot state a breach of contract claim because there was no breach of the express terms of the Agreement. Specifically, Defendant MAAF Vie argues that the Agreement expressly permitted MAAF Vie to transfer its shares in New California to Artemis and did not require MAAF Vie to "make an representations regarding any prior agreement or understandings concerning MAAF Vie's New California shares." MAAF Defendants' Motion p. 9:Ins. 8-10. The CL Defendants argue there was no breach because the Agreement permitted MAAF Vie to transfer its shares in New California to Artemis. CL Defendants' Motion p. 18:Ins. 3-21.

Plaintiff contends that the SAC sufficiently states a cause of action for breach of the express terms of the Agreement because "the *portage* agreements transferred the MAAF Syndicate's ownership and control of New California stock to Credit Lyonnais and Altus," neither of whom were permitted transferees. Opp. p. 25:Ins. 8-10. Additionally, Plaintiff contends that the Agreement was breached by the transfer of shares to Artemis, because "the transfer to Artemis was, in reality, a transfer of shares to Credit Lyonnais." Opp. p. 27:Ins. 3-4.

There is no dispute that pursuant to the express terms of the Agreement, Artemis was a permitted transferee entitled to purchase MAAF Vie's shares in New California without triggering Plaintiff's alleged first refusal right. Because Plaintiff cannot dispute the express language of the Agreement, it argues that a transfer to Artemis was really a transfer to the CL

Defendants and Altus, and such a transfer was not permitted. Plaintiff's argument is unavailing. Pursuant to the Agreement, Artemis was a permitted transferee to whom MAAF Vie could transfer its share without triggering Plaintiff's alleged first refusal right. The express terms of the Agreement did not require MAAF Vie to make any disclosures about ownership or control of Artemis, or require any disclosures about any prior arrangements with respect to MAAF Vie's shares. Neither the MAAF Vie nor CL Defendants can be liable for breach of the express terms of the Agreement, when their conduct was specifically sanctioned by the Agreement. As a result, Plaintiff cannot state a cause of action for breach of the express terms of the Agreement.

2. Plaintiff Has Not Sufficiently Alleged a Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff also alleges a cause of action for breach of the implied covenant of good faith and fair dealing. The gravamen of this cause of action, like Plaintiff's breach of contract claim, is that MAAF Vie and the CL Defendants breached an implied obligation in the Agreement by transferring their shares in New California to Artemis.

To state a cause of action for breach of the implied covenant of good faith and fair dealing, Plaintiff must allege "a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Fitzgerald v. Cantor*, 1998 WL 842316, *1 (Del. Ch. 1998). "[The] court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they

negotiated the issue, the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." *Id. See also Dunlap v. State Farm Fire and Cas. Co.* 878 A.2d 434, 442 (Del. 2005) ("This Court has recognized 'the occasional necessity' of implying contract terms to ensure the parties' 'reasonable expectations' are fulfilled. This quasi-reformation, however, 'should be [a] rare and fact-intensive' exercise, governed solely by 'issues of compelling fairness.' Only when it is clear from the writing that the contracting parties 'would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections.").

Although Plaintiff has had many opportunities to properly plead a cause of action for breach of the implied covenant, the sum total of Plaintiff's efforts are reflected in the following allegation: "the members of the MAAF Syndicate, Altus and Credit Lyonnais violated the . . . covenant of good faith and fair dealing implied [in the Stockholders Agreement] on the ground that the members of the MAAF Syndicate transferred the shares nominally held by them to Artemis pursuant to Artemis obtaining DOI approval of the transfer through fraudulent means in furtherance of the illicit conspiracy." SAC ¶ 73.[6] This allega-

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[6] In its Opposition to Defendants' Motions, rather than identify the specific implied obligation it sought to have made part of the Agreement and how that obligation could be implied from the express terms of the Agreement, Plaintiff simply rehashed the single allegation in its SAC. *See* Opp. p. 28:Ins. 24-27. ("[t]he MAAF Syndicate's sale of its shares to a party it knew was defrauding the Commissioner to circumvent [Plaintiff's] right of first refusal constituted a breach of the MAAF Syndicate's duty of good faith and fair dealing under the Stockholders

tion is plainly insufficient to state a cause of action for breach of the implied covenant. Nowhere does Plaintiff state what implied obligation it seeks to have "read" into the Agreement, nor does it identify any express terms of the Agreement that would support the Court implying such an obligation.

Moreover to the extent Plaintiff seeks to have the Court imply a term into the Agreement that would prohibit conduct (the transfer of shares to Artemis), expressly authorized by the Agreement, Plaintiff's breach of the implied covenant cause of action must fail. "[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d at 441 and cases cited therein. "The express terms of a contract and not an implied covenant of good faith and fair dealing . . . govern the parties' relations when the terms expressly address the dispute." *Fitzgerald v. Cantor*, 1998 WL 842316 at *1. *See also Homan v. Turoczy*, 2005 WL 2000756, *19 (Del. Ch. 2005) (dismissing breach of the implied covenant claim because the Court would not find an implied obligation in the contract that prohibited defendant from doing that which he had the legal right to do).

Because of Plaintiff's repeated failure to identify an implied term consistent with the express terms of the Agreement, and its inability to demonstrate how the

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Agreement.") Additionally, at oral argument, Plaintiff's counsel initially conceded that there were no additional terms it could allege to save this cause of action if the Court granted Defendants' Motions. Plaintiff's counsel subsequently recanted, indicating that Plaintiff would allege additional implied terms if given an opportunity to amend, but did not elaborate on what terms it would or could add to save this cause of action.

breach of an implied term would not be based on the transfer of New California shares to Artemis, any further amendment of this claim would be futile. Accordingly, Plaintiff's second cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing is dismissed with prejudice.

C. Plaintiff's Causes of Action for Interference with Contract and Interference with Prospective Economic Advantage Are Barred By the Two-Year Statute of Limitations

Plaintiff's third and fourth causes of action are claims for interference with contract and interference with prospective economic advantage ("Interference Claims"), respectively against all Defendants, except MAAF Vie. The gravamen of Plaintiff's Interference Claims is that the Defendants, except MAAF Vie, interfered with Plaintiff's right to obtain the 67% interest in New California owned by the MAAF Syndicate pursuant to the Stockholders Agreement ("Agreement"). With respect to its interference with contract cause of action, Plaintiff alleges that Defendants, except MAAF Vie, interfered with its right to obtain the 67% interest in New California because "the secret *contrats de portage* operated as a transfer of ownership and control of the MAAF Syndicate's shares in New California to Altus and therefore Credit Lyonnias" and because "the MAAF Syndicate transferred the shares nominally held by them to Artemis pursuant to Artemis obtaining DOI approval of the transfer through fraudulent means . . . ." SAC 73. With respect to its interference with prospective economic advantage cause of action, Plaintiff alleges that Defendants, except MAAF Vie, interfered "by (a)

seeking to conceal the *contrats de protage* from, and making material false statements and omissions, to the DOI and others regarding Artemis' role in the secret conspiracy and the extent of Credit Lyonnais' ownership and control, directly or indirectly, of the stock in New California and of Artemis itself; (b) concealing the true facts from, and making material false statements and omissions to, [Plaintiff]; and (c) causing the MAAF Syndicate members to transfer their stock in New California to Artemis pursuant to DOI approval obtained through fraudulent means . . ." SAC ¶ 82.

The parties agree that the two-year statute of limitations set forth in California Code of Civil Procedure section 339(1) applies to Plaintiff's Interference Claims. Defendants contend that Plaintiff's Interference Claims are time-barred because Plaintiff has admitted that it knew by February, 1999 at the latest, of the existence of its Interference Claims, the tolling agreements cannot save these claims, and because even if Plaintiff had not admitted that it knew about its claims in February, 1999, it should have known about them by that time. Plaintiff claims that the discovery rule applies in this case and a determination of when Plaintiff's Interference Claims accrued should not be made on a motion to dismiss, that it has not admitted that it knew about the existence of these claims by February, 1999, and that the statute of limitations should be tolled as a result of Defendants' fraudulent concealment.

Plaintiff must rely on the discovery rule, because the conduct that Plaintiff alleges caused the interference of its right to obtain the remaining 67% interest in New California took place in the early 1990s, commencing with the making of the *portage*

agreements, and was complete at the latest by 1995 when Artemis acquired the MAAF Syndicate shares in New California, long before Plaintiff filed this action. Thus, in order to avoid the bar of the statute of limitations, Plaintiff alleges that it did not, and could not, have discovered the existence of these claims until some later date.

The discovery rule postpones the commencement of the statute of limitations until plaintiff "suspects or should suspect that her injury was caused by wrongdoing." *Jolly v. Eli Lilly Co.*, 44 Cal.3d 1103, 1110 (1988). "[T]he limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry." *Id.* "So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Id.*; *accord Harrell v. Twentieth Century Ins. Co.*, 934 F.2d 203, 206 (9th Cir. 1991) (applying California's discovery rule). A plaintiff relying on the discovery rules must "specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *CAMSI IV v. Hunter Tech. Corp.*, 230 Cal.App.3d 1525, 1536-37 (1991) (internal citations and quotations omitted).

However, where, as in this case, a plaintiff admits that it had actual knowledge of the facts which form the basis of its claims, the Court may rely on that admission to determine when the statute of limitations commences to run. *See Sanchez v. South Hoover Hospital*, 18 Cal.3d 93, 101 (1976) ("Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute."). *See also Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (finding that statute of limitations had run

where plaintiff admitted to having actual knowledge of his claim.) "If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (affirming dismissal of plaintiff's fraud claim because plaintiff's allegations revealed that she knew of the facts upon which her claim was based more than three years before she filed her complaint).

With respect to the discovery of its claims, Plaintiff alleges the following:

> [Plaintiff] did not learn, nor, in the exercise of reasonable diligence, should have learned, of the existence of the claims asserted herein until some time after it entered tolling agreements with all Defendants, as the facts underlying [Plaintiff's] claims slowly became uncovered in the face of Defendants' efforts to continue to conceal their liability through false denials of wrongdoing.

SAC ¶ 64.

> [Plaintiff] did not learn, nor, in the exercise of reasonable diligence, could have learned, of the existence of the claims asserted herein before the period on or around late 1998 or early 1999, shortly *before* the California Fraud Action was filed.

Complaint ¶ 86 (emphasis added).

In order to avoid the consequence of its admission in paragraph 86 of the Complaint,[7] Plaintiff contends

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[7] Material allegation of a complaint are deemed admitted for the purposes of a motion to dismiss. *See, e.g., Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

that paragraph 86 in the Complaint means that Plaintiff did not learn of the 'existence of its claims until sometime after the California Fraud Action was filed. In other words, Plaintiff contends that when it alleged that it did not learn of the existence of the Interference Claims until "on or around late 1998 or early 1999, shortly *before* the California Fraud Action was filed," it really meant that it did not learn of the claims until *after* the California Fraud Action was filed. Thus, according to Plaintiff, paragraph 64 of the SAC, is not inconsistent with paragraph 86, because both allege that Plaintiff learned of its claims sometime after the California Fraud Action was filed in February, 1999.

Undoubtedly, if Plaintiff intended to convey that it did not learn of the existence of its claims until sometime *after* the California Fraud Action was filed, Plaintiff would have been quite capable of using the word "after," rather than the word "before" to establish the date of its knowledge of the facts which form the basis for its Interference Claims. Although in ruling on a motion to dismiss, the Court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to Plaintiff, (*See Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d at 661), the Court "need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)). *See also Miranda v. Clark County, Nev.*, 279 F.3d 1102, 1106 (9th Cir. 2002) ("[C]onclusory allegations of law and unwarranted inferences will not defeat a motion to dismiss for failure to state a claim.");

Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.) ("Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."), *amended*, 275 F.3d 1187 (9th Cir. 2001).

Plaintiff's attempt to explain away or plead around its admission is of no avail. Plaintiff has admitted that it knew about the existence of its claims "shortly before the California Fraud Action" was filed on February 18, 1999.[8] As a result, Plaintiff was required to file its Interference Claims or enter into agreements with Defendants tolling these claims, on or before February, 2001. Plaintiff did not file this action until February 9, 2005, and did not enter into any tolling agreements with Defendants until the earliest tolling agreement which was entered into with the Artemis Defendants in May, 2001.[9]

Plaintiff's third cause of action for interference with contract and fourth cause of action for interference

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[8] Even if Plaintiff had not admitted that it had actual knowledge of its Interference Claims by the filing of the California Fraud Action in February, 1999, Plaintiff's allegations demonstrate that it had "notice or information of circumstances to put [it] on inquiry" by that time. *Jolly v. Eli Lilly Co.*, 44 Cal.3d at 1110. "So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Id.*; *accord Harrell v. Twentieth Century Ins. Co.*, 934 F.2d 203, 206 (9th Cir. 1991) (applying California's discovery rule).

[9] Even if the Court were to some how construe Plaintiff's allegation that it knew of its claims "shortly before the California Fraud Action was filed" to mean shortly before the California Fraud Action (AMC removed to them District rather than when it was first filed in Los Angeles Superior Court, Plaintiff's Interference Claims would still be barred by the statute of limitations because the California Fraud Action was removed to the District Court on March 18, 1999.

with prospective economic advantage are barred by the statute of limitations.[10] Although leave to amend "shall be freely given when justice so requires" (Fed. R. Civ. P. 15(a)), "[l]eave to amend should not be granted where the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 204 F.R.D. 460, 463 (C.D. Cal. 2001) (internal citation and quotations omitted). Accordingly, Plaintiff's third cause of action for interference with contract and fourth cause of action for interference with prospective economic advantage are dismissed with prejudice.[11]

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[10] In light of the Court's determination that Defendants did not breach the Stockholders Agreement, the Court concludes that Plaintiff cannot maintain its claim for interference with contract. Where, as here, the contract allegedly interfered with is not breached, there can be no interference with contract cause of action. *See, e.g., Farmers Ins. Exchange v. State of California*, 175 Cal.App.3d 494, 506 (1986) (dismissing claim for interference with contract because where there was no breach of contract). In addition, Plaintiff's claim for interference with prospective economic advantage also fails because of the speculative nature of its claim that it had a reasonable expectation of acquiring the outstanding shares of New California. *See, e.g., Youst v. Longo*, 43 Cal.3d 64, 71 (1987) (emphasis in original) ("[A]s a matter of law, a threshold causation requirement exists for maintaining a cause of action for [interference with prospective economic advantage], namely, proof that it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference.").

[11] Because Plaintiff has admitted that it knew of the existence of it claims in February, 1999, the Court will not consider whether the statute of limitations should be equitably tolled because of Defendants' fraudulent concealment.

IV. CONCLUSION

Based on the foregoing, Defendants' Motions are **DENIED** with respect to Plaintiff's first cause of action for fraud and deceit. Defendants' Motions are **GRANTED** with respect to Plaintiff's second cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing, Plaintiff's third cause of action for interference with contract and Plaintiff's fourth cause of action for interference with prospective economic advantage, and these causes of action are **DISMISSED with prejudice**. Defendants shall have fifteen (15) days from the date of this Order to answer the Second Amended Complaint.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES GENERAL

[THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).]

Case No. CV 05-1035-JFW (CWx)

Date: May 31, 2007

Title: AIG RETIREMENT SERVICES, INC. -v- ALTUS FINANCE S.A., et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	None Present
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANT;

None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT [filed 3114107; Docket Nos. 274, 290 and 327];

ORDER DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT [filed 3/14/07; Docket Nos. 279 and 280]

[Entered Jun 1, 2007]

On March 14, 2007, Defendants Artemis S.A., Artemis Finance S.N.C. and Aurora S.A. (collectively, the "Artemis Defendants") filed a Motion for Summary Judgment with Respect to Plaintiff's Fraud Claim or, in the Alternative, for Partial Summary Judgment with Respect to Plaintiff's Claim for "Lost Profits" Damages (the "Artemis Motion"). On March 14, 2007, Defendants Credit Lyonnais S.A., Consortium de Realisation S.A. and CDR Enterprises (collectively, the "CL Defendants") filed a Motion for Summary Judgment (the "CL Motion"). On March 14, 2007, Defendants MAAF Assurances ("MAAF") and MAAF Vie, S.A. (collectively, the "MAAF Defendants") filed a Motion for Summary Judgment (the "MAAF Motion").[1] On April 4, 2007, Plaintiff AIG Retirement Services, Inc., formerly known as SunAmerica Inc. ("Plaintiff"), filed its Consolidated Opposition to Defendants' Motions for Summary Judgment. On April 25, 2007, Defendants filed their respective Replies. Also on March 14, 2007, Plaintiff filed two separate Motion[s] for Summary Judgment, or in the Alternative, Summary Adjudication against the MAAF Defendants and Artemis S.A.. On April 4, 2007, the MAAF Defendants and Artemis S.A. filed their respective Oppositions. On April 25, 2007, Plaintiff filed its Replies. The Motions for Summary Judgment came regularly for hearing on May 7, 2007. After hearing oral argument on the Motion, the Court took the matter under submission. After reviewing the moving, opposing, and reply papers and hearing oral argument, the Court rules as follows:

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[1] The defendants shall collectively be referred to as "Defendants" and their respective motions for summary judgment shall be collectively referred to as either the "Motion" or the "Motions for Summary Judgment".

I. FACTUAL BACKGROUND

In 1990 and the early part of 1991, Executive Life Insurance Company ("ELIC"), a California-based life insurance company, began experiencing severe financial problems, in large part because the value of its substantial portfolio of high yield, or junk, bonds, acquired in the late 1980's had declined precipitously. In April 1991, ELIC was placed into conservation and the Insurance Commissioner for the State of California, John Garamendi ("Garamendi" or the "Commissioner"), was appointed the rehabilitator, conservator and liquidator of ELIC.

The core of the rehabilitation was a public sale of ELIC's two principal assets, its junk bond portfolio and insurance business. From the outset of the competitive bidding process, the Commissioner stated his preference for bids that were "unified" or "comprehensive", i.e., bids that dealt with both the bonds and the insurance business as part of a single package.

Between May and August 1991, the Commissioner negotiated an agreement with a consortium of European companies and investors led by Altus Finance S.A. ("Altus"), predecessor in interest to Defendant CDR Enterprises and affiliate of Defendant Credit Lyonnais S.A. ("Credit Lyonnais"), that could be used as a benchmark against which other bidders could compete. This template, which became known as the "definitive agreement", provided that Altus would purchase ELIC's junk bond portfolio for $2.7 billion and the investor group would acquire ELIC's insurance business in exchange for an additional payment of $300 million, $200 million of which would be loaned by Altus and all of which would be guaranteed by Credit Lyonnais.

Ultimately, three bids qualified for full consideration,[2] those submitted by: (1) NOLHGA; (2) Sierra National Insurance Holdings, Inc. ("Sierra"); and (3) Altus and the group of European investors led by MAAF (the "MAAF Group"). The NOLHGA and Sierra bids were "bonds-in" bids, in which the high-risk junk bonds that caused ELIC's collapse would remain assets of the newly-rehabilitated insurance company. By contrast, the Altus/MAAF Group bid was a "bonds-out" bid, in which the junk bonds would be sold to Altus in exchange for cash, and the insurance policies of former ELIC policyholders would be restructured and transferred to a new insurance company named "Aurora" that would be owned by a holding company, "New California Life Holdings, Inc." ("New California") whose shares would be owned by the MAAF Group.

Although the Commissioner preferred a "bonds-out" bid, in late October 1991, he nevertheless tentatively accepted the NOLHGA bid, but conditioned his acceptance on NOLHGA curing, within 10 days, a series of deficiencies including the bid's failure to include sufficient guarantees to protect policyholders from the risks associated with a further decline in the junk bond market. After NOLHGA failed to meet his conditions, the Commissioner formally rejected the NOLHGA bid and announced his intention to select either the Altus/MAAF Group bid or the Sierra bid. Shortly thereafter, the Commissioner selected the Altus/MAAF Group bid, stating in a November 14, 1991 press release that "[w]hile both of the final bids

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[2] During the bidding process, Plaintiff submitted a limited bid strictly for ELIC's insurance business. Because Plaintiff's bid was not comprehensive in that it did not encompass the junk bonds, it was summarily rejected by the Commissioner.

are superb, the Aurora proposal . . . provides the needed security by removing the junk bonds from the company, and is superior since it delivers more money to policy holders." The Commissioner then submitted the Altus/MAAF Group bid for approval to the Rehabilitation Court, which approved the bid (hereinafter, the "Rehabilitation Plan")[3] in December 1991 following an eleven day evidentiary hearing.

On February 18, 1992, the Rehabilitation Court issued an order confirming and approving, *inter alia*, the Commissioner's acceptance of the Altus/MAAF Group bid and the purchase and sale agreement attendant thereto. On March 3, 1992, the Commissioner transferred ownership of the majority of ELIC's junk bond portfolio to Altus. On July 31, 1992, the Rehabilitation Court issued its final order approving the Rehabilitation Plan. Although the junk bond portfolio had already been transferred, the sale of the restructured insurance business to the MAAF Group was stayed pending the resolution of various appeals filed by several policyholder groups.

On March 23, 1993, the California Court of Appeal issued its ruling in *Commercial National Bank In Shreveport v. Superior Court*, 14 Cal. App. 4th 393 (1993), disapproving of three discrete aspects of the Rehabilitation Plan and requiring the Rehabilitation Court to vacate its July 31, 1992 order "with the hope and expectation that the deficiencies will be corrected and a new plan submitted that can be approved." *Id.* at 399. In response to this ruling, the Rehabilitation

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[3] Pursuant to the Rehabilitation Plan, Altus agreed to purchase the ELIC junk bond portfolio in exchange for a $3.25 billion cash payment to the ELIC estate and the MAAF Group agreed to provide an additional $300 million to acquire the insurance business (Aurora).

Court directed the Commissioner to consider new bids for the ELIC estate.

Shortly thereafter, according to Plaintiff's CEO, Eli Broad ("Broad"), Plaintiff went "right back to work" in preparing a proposal for ELIC's entire insurance business. During discussions with the Insurance Commissioner, however, Plaintiff was discouraged from making a competing bid for the entire insurance business and instead was encouraged to negotiate the acquisition of a partial interest in New California. Ultimately, at the urging of the Commissioner, Plaintiff concluded that its best course was to participate in the Rehabilitation Plan rather than compete against it. Thus, in May 1993, Plaintiff's officers and representatives began negotiating the purchase of a minority interest in New California.

On June 10, 1993, Plaintiff and New California entered into a Subscription Agreement pursuant to which Plaintiff would acquire a 33 percent interest in New California and a Confidentiality and Standstill Agreement pursuant to which Plaintiff agreed, *inter alia*, to refrain from submitting an independent bid for ELIC's insurance business without New California's consent whether or not the sale of ELIC's insurance assets to Aurora ever closed. On September 3, 1993, ELIC's assets and liabilities were transferred to Aurora and, pursuant to the Stockholders Agreement,[4] Plaintiff paid $33 million for 33 percent of New California's shares. Among other provisions, the Stockholders Agreement provided certain "first

[4] The form of the Stockholders Agreement to be executed by Plaintiff, New California and the other members of the MAAF Group upon the closing of the sale of ELIC's insurance assets was previously attached as Exhibit A to the Subscription Agreement.

refusal" rights to the New California shareholders, and allowed New California to name five "permitted transferees"[5] to whom a New California shareholder could transfer its shares free of any restraints imposed by the right of first refusal provisions. The Stockholders Agreement also contained three "put" options, one of which permitted Plaintiff to sell its shares back to New California between 6 to 12 months after closing at a guaranteed 10 percent return on its New California investment if it elected to exercise the put option.

On June 23, 1998, the Commissioner's senior staff first learned of secret portage contracts between Altus and one or more members of the MAAF-led investor group. *See Garamendi v. SDI Vendome S.A.*, 276 F. Supp. 2d 1030, 1035 (2003). As a result of this discovery, on February 18, 1999, the Commissioner filed his initial complaint in state court, naming Altus, CDR Enterprises, Credit Lyonnais, various members of the MAAF Group and numerous individuals as defendants.[6] *Id.* As explained by Judge

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[5] Pursuant to the Stockholders Agreement, Plaintiff was to be provided with a list of the permitted transferees five days before the insurance transaction was scheduled to close. Although the list of permitted transferees was not provided to Plaintiff five days in advance of the closing, Plaintiff nonetheless accepted delivery of the list on September 3, 1993 without objection and expressly waived, in writing, any right to object. The list received by Plaintiff on September 3, 1993 identified the following parties as permitted transferees: "ARTEMIS", "FINANCIERE PINAULT", "SHAMROCK", "EVRAN", and "ARTEMIS FINANCE".

[6] The case was subsequently removed to the United States District Court, Central District of California, and assigned to Judge A. Howard Matz. *See Garamendi v. Altus Finance S.A.*, Case No. 99-02829 AHM (CWx) (the "*Garamendi* Action").

Matz, the heart of that case, and numerous other cases filed in its wake, was the Commissioner's allegation that "the various members of the MAAF-led investor group emerged victorious in the ELIC bidding process only because of a massive fraud they perpetrated against the Commissioner." *Id.* at 1033. "Although members of the investor group . . . held themselves out during the bidding process as 'independent' investors, they had (at least according to the Commissioner) already entered into secret '*contrats de portage*' [or portage agreements] with Altus and Credit Lyonnais by which they promised to 'act as fronts or 'porteurs' for Altus and Credit Lyonnais with the understanding that any interest that they acquired in Aurora . . . would be held solely for the benefit of Altus and Credit Lyonnais' . . . . [in a manner] designed to avoid California and federal laws[7] that prohibited Altus and Credit Lyonnais from owning or controlling ELIC or its successor insurance company, Aurora." *Id.* at 1033-34. Similar to the Commissioner's claims, and the claims of Sierra in a related action, Plaintiff's claims in this action are premised on Defendants' alleged concealment of the portage agreements.

II. PROCEDURAL HISTORY

Plaintiff filed its Complaint on February 9, 2005 ("Complaint") and on September 6, 2005, Plaintiff

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[7] These laws were California Insurance Code § 699.5, which, at the time, prohibited a foreign government (or its agency or subdivision) from directly or indirectly owning, operating or controlling an insurance company in California, and the Federal Bank Holding Company Act, which prohibits a bank holding company from owning more than 25 percent of any company that was not a bank or authorized business. 12 U.S.C. § 1841 *et seq.*

filed an Amended Complaint. On November 2, 2005, pursuant to the Court's order based on the stipulation of the parties, Plaintiff filed a Second Amended Complaint ("SAC") which alleged the following causes of action: (1) fraud and deceit, (2) breach of contract, (3) interference with contract, (4) interference with prospective economic advantage.[8] On February 28, 2006, the Court dismissed with prejudice all but Plaintiff's first cause of action for fraud and deceit.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of

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[8] It is unclear why Plaintiff styled its claims for relief as "causes of action" because this action was originally filed in this Court, and is not here by way of removal.

material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Sew., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1907).

B. Fraud

In California, "[t]he elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *City Solutions, Inc. v. Clear Channel Communications* ("*City Solutions II*"), 365 F.3d 835, 839 (9th Cir. 2004) (citation omitted).[9] A plaintiff must prove each and every element in order to prevail on a fraud claim; failure to prove even one element is fatal to recovery. *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 976 (9th Cir. 2002) (citing *Pearson v. Norton*, 230 Cal.App.2d 1, 7-8 (1964)).

Under California law, the nature and extent of a defrauded plaintiff's damages recovery depends upon whether or not the fraud is deemed to have occurred in the purchase, sale or exchange of property. Fraud in the non-property context is governed by Civil Code sections 1709 and 3333, which generally provide that

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[9] Although Plaintiff has not separately pled a fraudulent concealment cause of action, Plaintiff's cause of action for fraud and deceit in the SAC alleges that Defendants committed fraud through both concealment and misrepresentation. The elements of an action for fraud and deceit based on concealment are: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Lovejoy v. AT&T Corp.*, 92 Cal. App. 4th 85, 96 (2001) (citation and quotations omitted).

one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage proximately caused by the deceitful conduct, whether it could have been anticipated or not. Cal. Civ. Code § 1709 ("Section 1709"); Cal. Civ. Code § 3333 ("Section 3333"). However, both statutes are displaced by the more specific damages provisions of Civil Code section 3343 when the fraud occurs between buyer and seller in a transaction involving the purchase, sale or exchange of property.[10] *See* Cal. Civ. Code § 3333 (providing general measure of compensatory damages "except where otherwise expressly provided by this code . . . ."); *Alliance Mortgage*, 10 Cal. 4th at 1240-41; *see also Walsh v. Hooker and Fay*, 212 Cal. App. 2d 450, 458 (1963) ("The rule is . . . well established that in the typical case involving a fraudulent vendor and a defrauded vendee, section 3343 provides the exclusive measure of damages."). Section 3343 provides, in pertinent part:

> (a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

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[10] Although the California Supreme Court has ruled that fraud by a fiduciary, including fraud involving the purchase or sale of property, is governed by Section 3333 and not Section 3334, *see Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1241 (1995), this fiduciary exception is inapplicable in the present case.

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud . . . .

Although neither Section 3333 nor Section 3343 authorizes "benefit-of-the-bargain" damages, both permit a defrauded plaintiff to recover lost profits (if proven) in addition to other traditional "out-of-pocket" damages.[11] California law requires, however,

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[11] As explained by the California Supreme Court:

The "out-of-pocket" measure of damages "is directed to restoring the plaintiff to the financial position

that a plaintiff prove all of its damages, including lost profit damages, with "reasonable certainty." *See S.C. Anderson, Inc. v. Bank of America*, 24 Cal. App. 4th 529, 536 (1994) ("Most prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. fit, is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct.") (citations omitted). "The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." *Id.* Finally, it is also well-settled that under California law, "[a] plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done.'" *City Solutions City Solutions Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp. 2d 720, 729 (N.D. Cal. 2003) ("*City Solutions I*") (*aff'd. in part and rev'd. in part by City Solutions II*) (quoting *Christiansen v. Roddy*, 186 Cal. App. 3d 780, 790 (1986)).

> enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The 'benefit-of-the-bargain' measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive." [citations] "In California, a defrauded party is ordinarily limited to recovering his 'out-of-pocket' loss. . . ." [citation].

Alliance Mortgage, 10 Cal. 4th at 1240.

IV. DISCUSSION

A. Plaintiff Has Failed to Establish All of the Necessary Elements of its Fraud Claim

The gravamen of Plaintiff's fraud cause of action is that Defendants made false and misleading statements and concealed material facts regarding the ownership and control of shares in New California during Plaintiff's negotiations to acquire a minority interest in New California. As a result of its reliance on Defendants' alleged misrepresentations and omissions, Plaintiff alleges that it paid an excessive price for the New California stock it actually acquired and sustained other significant losses including contributing to the costs of defending and settling litigation relating to the ELIC transaction. SAC at ¶ 69. In addition to seeking recovery for these traditional out-of-pocket expenses, Plaintiff also alleges that, but for Defendants' allegedly deceitful conduct, Plaintiff would have acquired 100 percent of ELIC's insurance business either by submitting its own independent winning proposal to the Insurance Commissioner in 1993 or through the purchase of the remaining 67 percent of New California stock from New California's other shareholders. Accordingly, Plaintiff also seeks to recover the lost profits it would have earned had it actually acquired 100 percent of ELIC's insurance business.

1. Plaintiff Is Not Entitled to Lost Profits under Any Theory of Recovery

Plaintiff sets forth three distinct theories to justify its recovery of lost profits: (1) the "defrauded bidder"; (2) the "defrauded purchaser"; and (3) the "defrauded

holder of a right of first refusal."[12] In the sections below, the Court addresses each of Plaintiff's theories in turn.

a. PLAINTIFF IS NOT ENTITLED TO RECOVER LOST PROFITS AS A "DEFRAUDED BIDDER"

(i). Plaintiff Has Admitted That It Did Not Rely on Defendants' Allegedly Fraudulent Conduct

Under its "defrauded bidder' theory, Plaintiff argues that it refrained from submitting its own bid for 100 percent of ELIC's insurance assets and instead decided to join the MAAF Group's bid as a minority investor in New California in reliance upon Defendants' fraudulent conduct. Accordingly, Plaintiff argues that under sections 1709 and 3333 of the California Civil Code it is entitled to the lost profits it would have earned had it been able to purchase 100 percent of ELIC as opposed to a 33 percent interest in New California. However, before even reaching the damages prong of the fraud analysis, the Court finds that Plaintiff's "defrauded bidder" theory fails because Plaintiff has not established the necessary element of justifiable reliance, i.e., that Defendants' fraud caused Plaintiff to refrain from submitting its own independent proposal for 100 percent of ELIC.

"Under California law, '[a] complete causal relationship between the fraud or deceit and the plaintiff's damages is required." *City Solutions II*, 365 F.3d 835, 840 (9th Cir. 2004) (quoting *Small v. Fritz Cos.*,

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[12] Plaintiff specifically identifies these three theories in its May 9, 2007 Post-Hearing Submission Re: Defendants' Summary-Judgment Motions ("Post-Hearing Submission"). *See* Post-Hearing Submission at 2.

30 Cal. 4th 167, 202 (2003)). "'An essential element in recovery for deceit is proof of the plaintiff's justifiable reliance on the defendant's fraudulent representations.'" *Id.* (*quoting Slakey Bros. Sacramento, Inc. v. Parker*, 265 Cal. App. 2d 204, 207-08 (1968)). "'Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction.'" *City Solutions II*, 365 F.3d at 840 (quoting *Alliance Mortgage*, 10 Cal.4th at 1239). "It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.'" *Id.* (quoting *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 976-77 (1997) (alterations in original) (*quoting* Restatement (Second) of Torts § 546 cmt. b at 103)).

In its Opposition, Plaintiff argues that immediately following the California Court of Appeal's decision in *Commercial Nat'l Bank In Shreveport v. Superior Court*, 14 Cal. App. 4th 393 (1993), and the Rehabilitation Court's subsequent announcement that "'[a]nybody who has a comprehensive plan is encouraged to present it to the Commissioner,'" it "'went right back to work" preparing a bid for 100 percent of ELIC. Opposition at 6 (*respectively quoting* March 25, 1993 Rehabilitation Court Transcript[13] at 70 and

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[13] The March 25, 1993 Rehabilitation Court Transcript is attached as Exhibit 84 to the Declaration of Robert M. Swerdlow

Deposition of Eli Broad ("Broad Depo.")[14] at 53:20-55:16). Plaintiff further contends that "[w]hen the proponents of the Altus/MAAF bid learned that [Plaintiff] planned to put forward an independent plan, the MAAF Group's investment bankers and lawyers approached [Plaintiff] about acquiring an interest in New California and joining the Altus/MAAF bid." *Id.* at 7. According to Plaintiff, at the time it began communicating with the MAAF Group, it "'had no plans to partner with the French . . . . [it] wanted the entire company, not a piece of it.'" *Id.* at 8; Plaintiff's AF No. 31 (quoting Broad Depo. at 86:17-20). Plaintiff contends, however, that in response to "overtures" of the MAAF Group's lead negotiator, Craig Cogut ("Cogut") of Apollo Advisors ("Apollo"), Broad directed his team to proceed on two tracks: "first, the team should continue to prepare to make an independent bid for 100% of the insurance company; and second, it should pursue negotiations with Apollo regarding the possibility of joining the MAAF Group bid . . ." Opposition at 8 (citing Plaintiff's AF No. 34). Finally, Plaintiff argues that in reliance on misrepresentations[15] made by Cogut and

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in Support of Plaintiff's Opposition ("Swerdlow Decl.") and is cited in support of Plaintiff's Additional Fact ("AF") No. 2.

[14] The Broad Depo. is attached as Exhibit 140 to the Swerdlow Decl. and the referenced excerpt above is cited in support of Plaintiff's AF No. 16.

[15] Plaintiff alleges that Defendants: (1) concealed the existence of certain portage agreements between Altus and the members of the MAAF Group; (2) concealed the fact that members of the MAAF Group were merely "fronts" for Altus based upon these secret portage agreements; (3) misrepresented to Plaintiff that there were no options, rights or agreements to acquire the MAAF Group's New California stock despite the existence of the portage agreements and an undisclosed

others, Plaintiff elected to forego its independent bid in favor of joining the MAAF Group's proposal as a minority investor. *Id.* at 67.

The CL Defendants argue, however, and the Court finds, that Plaintiff's argument is undermined by its sworn admissions in both the SAC and its Verified Complaint In Intervention filed May 7, 2001 in *Low v. Altus Finance S.A., et al.*, Case No. 99-02829 (the "Verified Complaint In Intervention"),[16] that it decided not to pursue a bid for the entire insurance company because the ***Commissioner*** discouraged it from doing so and that it was only ***after*** Plaintiff had decided to negotiate a partial interest in New California that it began negotiations with Cogut and other representatives of the MAAF Group. *See* CL Reply at 9; CL Response to Plaintiff's Separate Statement of Additional Facts at Nos. 27 and 31. Specifically, in its Verified Complaint In intervention, Plaintiff admits:

> 26. . . . After the [*Commercial National Bank*] opinion was released, . . . SunAmerica reasserted its interest in purchasing the entire insurance business.

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memorandum of understanding ("MOU") between Credit Lyonnais, Altus and French businessman Francois Pinault, concerning Artemis' future rights to acquire New California stock; (4) misrepresented the status and intentions of the permitted transferees; (5) concealed that the MAAF Group's proposal had obtained the regulatory approval through fraud by failing to disclose the portage agreements to the Commissioner and the Federal Reserve; and (6) misrepresented that Plaintiff had good prospects to acquire the remaining 67 percent of New California stock.

[16] The Verified Complaint In Intervention is attached as Exhibit 6 to the Supplemental Declaration of Thomas J. Benedict in Support of the CL Motion ("Sapp. Benedict Decl.").

During communication with the Insurance Commissioner, however, SunAmerica was discouraged from making a competing bid for the entire business but instead was encouraged to negotiate the acquisition of an interest in New California . . .

27. While SunAmerica was considering making a bid in 1993 for the insurance business of ELIC, the proponents of the rehabilitation plan, including the Insurance Commissioner, requested that the Rehabilitation Court approve modifications designed to cure the deficiencies identified in the *Commercial National Bank* decision and allow the sale of the company in accordance of [sic] the now modified plan of rehabilitation to go forward. **SunAmerica concluded that its best course was to participate in the plan then before the Rehabilitation Court by negotiating the acquisition of an interest in New California, the holding company that was to own Aurora.**

28. ***Thereafter***, SunAmerica began negotiations to acquire such an interest, primarily through communications with representatives and agents of the MAAF syndicate and New California. ***Before entering into these negotiations, SunAmerica had had*** [sic] ***no contact with any of the MAAF syndicate***

> ***companies*** that had been the successful bidder for the insurance business in 1991.

Verified Complaint In Intervention at ¶¶ 26-28 (emphasis added); *See also* SAC at ¶ 47 ("Ultimately, however, ***at the urging of the Commissioner***, SunAmerica undertook to acquire a partial interest in New California, with the understanding that the MAAF Syndicate would own the rest of New California.") (emphasis added).

The Ninth Circuit unequivocally holds that "a party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier verison of the facts." *Block v. City of Los Angeles*, 253 F.3d 410, 419, n. 2 (9th Cir. 2001) (*citing Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975) (affirming district court's grant of summary judgment and noting: "If there is any issue of fact in the proofs, it exists only because of the inconsistent statements made by Radobenko the deponent and Radobenko the affiant. Thus, we are presented with the question of whether contradictory testimony of a plaintiff alone can be used by him to defeat a defendant's summary judgment motion where the only issue of fact results from the necessity of choosing between the plaintiff's two conflicting versions. . . . Here, we are convinced that the issues of fact created by Radobenko are not issues which this Court could reasonably characterized as genuine.")). Because Plaintiff has already admitted that it decided to abandon its plan to submit an independent proposal for 100 percent of ELIC ***before*** it had any contact with Defendants' representatives because the ***Commissioner discouraged*** it from doing so, Plaintiff is precluded from now arguing that it decided to refrain from submitting an independent

bid in reliance on Defendants' fraudulent misrepresentations during any subsequent negotiations with Cogut or others. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."). Accordingly, based upon Plaintiff's prior admissions, the Court finds as a matter of law that Plaintiff did not rely on any alleged fraudulent conduct committed by Defendant in deciding to refrain from bidding for the entirety of ELIC and Defendants are therefore entitled to summary judgment with respect to Plaintiff's "defrauded bidder" theory of recovery.

(ii). Plaintiff's Damages Are Governed by Section 3343

However, even if Plaintiff could prove that it relied on Defendants' alleged misrepresentations and omissions, Plaintiff's "defrauded bidder" theory still fails as a matter of law because the Court finds that Section 3343 provides Plaintiff's exclusive damages remedy. Here, regardless of the truth of Plaintiff's allegation that Defendants' overtures to Plaintiff were "motivated by their desire to avoid the possibility of a competing bid by [Plaintiff]", *see* Plaintiff's AF No. 34 (quotations and citations omitted), it is undisputed that the alleged misrepresentations were made during Plaintiff's negotiations with Defendants to acquire a minority interest in New California, *see* Opposition at 8-11, and it is further undisputed that Plaintiff ultimately acquired a 33 percent interest in New California. *See, e.g.*, Plaintiff's Statement of Genuine Issues of Material Fact in Opposition to the CL Motion at Fact No. 65. Thus, it is undisputed that Defendants' alleged fraud against Plaintiff occurred

in the context of negotiations for "property", i.e., New California stock. *See Hill v. Wrather*, 158 Cal. App. 2d 818, 825 (1958) ("Had there been actionable fraud in the sale of the stock, the measure of damages would have been that set forth in section 3343 of the Civil Code . . . "). Under California law, Section 3343 provides the "***exclusive*** measure of damages for fraud in such cases." *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 236 (2003) (emphasis added).

Plaintiff unsuccessfully attempts to bring its claim within the scope of Section 3333 by arguing that this case involves its failure to acquire property (the remaining 67 percent of ELIC's insurance business) rather than just its acquisition of property (33 percent of New California). This strained characterization, however, is belied by Plaintiff's own pleadings: the fraud Count in the SAC plainly states that "Defendants made false and misleading statements to SunAmerica, and concealed material facts from SunAmerica ***in connection with its purchase of stock in New California***." *See* SAC at ¶ 66 (emphasis added). Plaintiff nevertheless contends, based upon *City Solutions I*, that Section 3333 ***not*** Section 3343 applies to its lost profits claim because fraud in the "defrauded bidder" context is not fraud in the sale or exchange of property. Opposition at 47. Plaintiff further argues that "[w]here, as here, a plaintiff seeks damages as a result of being fraudulently prevented from acquiring property, the absence of a completed acquisition of property brings that damages claim outside section 3343." *Id.* (citing *Southern Union Co. v. Southwest Gas Corp.*, 108 F. Supp. 2d 1021, 1039 (D. Ariz. 2002)).

Unfortunately for Plaintiff, the factual circumstances in *City Solutions I* and *Southern Union* are

inapposite to this case. Whereas neither the joint bid at issue in *City Solutions I* nor the merger at issue in *Southern Union* were ever consummated, Plaintiff here did in fact purchase New California stock.[17] Tellingly, Plaintiff has not cited any case applying Section 3333 under the present factual circumstances in which some, but not all, of the property at issue was acquired. Furthermore, Plaintiff has not cited any case in support of its unpersuasive fallback position that it is entitled to damages under ***both*** Section 3333 (for "fraudulently induc[ing] Plaintiff not to bid" and Section 3343 (for Plaintiff's legal fees and settlement expenses incurred as a result of Defendants' alleged fraud). *See* Opposition at 72, n. 27. After considering all of the authorities cited by the parties, the Court finds the factual circumstances in *Kenly v. Ukegawa*, 16 Cal. App. 4th 49 (1993), to be the most analogous to those presented by this case. Thus, in keeping with *Kenly*, the Court finds that Plaintiff's request for lost profits should be analyzed exclusively under Section 3343.[18]

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[17] In addition, unlike the plaintiffs in *Southern Union* and *City Solutions*, Plaintiff has actually made a substantial profit on its investment as a result of Defendants' alleged fraud. Indeed, Plaintiff's counsel acknowledged during oral argument that Plaintiff's traditional out-of-pocket "losses" stemming from its purchase of New California stock are completely dwarfed by the profits it reaped from its 33 percent acquisition. *See* Reporter's Transcript of Motions Hearing held May 7, 2007 ("Hearing Transcript") at 12-13. Plaintiff has not cited, and the Court is not aware of, any fraud case involving a "defrauded bidder" where, as here, the allegedly defrauded Plaintiff actually profited as a result of the fraud.

[18] *See* Section IV(A)(1)(b), *infra*, for Section 3343 analysis.

(iii). Plaintiff's Claim for Lost Profits Also Fails under Section 3333

However, even if the Court were to permit Plaintiff to seek lost profits as a "defrauded bidder" pursuant to Section 3333, Plaintiff's claim still fails as a matter of law because Plaintiff has not proven that its alleged lost profits were proximately caused by Defendants' alleged fraudulent conduct.

a. *City Solutions Is Inapposite to Plaintiff's Case*

Plaintiff argues, based upon the Ninth Circuit's decision in *City Solutions II*, that "a reasonable fact finder could and, indeed, should find that Defendants' fraud prevented [Plaintiff] from acquiring 100% of ELIC." Opposition at 21. Plaintiff's argument, however, overestimates the applicability of the *City Solutions II* holding to its case. At most, *City Solutions II*, read in conjunction with *Southern Union*,[19] stands for the proposition that a defrauded bidder may ***seek*** lost profits pursuant to Section 3333, but these cases in no way support Plaintiff's argument that is entitled to ***recover*** such lost profits.

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[19] In *Southern Union*, the plaintiff (Southern Union) argued that absent the defendant's alleged fraudulent inducement, it would not have entered into a standstill agreement and would have instead submitted a tender offer to defendant's shareholders which would have been accepted and been profitable. *Southern Union*, 180 F. Supp. 2d at 1037. Although the court agreed that "[s]uch lost profit damages from Southern Union's inability to make a tender offer are typical tort damages that would make Southern Union whole by putting it in the position it would have been in absent [defendant]'s alleged fraudulent inducement", *id.*, the court nevertheless found that Southern Union's lost profit damages were far too speculative and could not be proven with reasonable certainty. *Id.* at 1036-37.

The facts of *City Solutions I* and *II* are as follows. In 1998, the City of San Francisco issued a request for proposals seeking a contractor to furnish, install and maintain 1,000 newsracks around the City. *City Solutions I*, 242. F. Supp. 2d at 722. In return, the winning bidder would receive the lucrative right to sell advertising on or around the newsracks. *Id.* During the Spring of 1998, City Solutions, Inc. ("CSI") entered into negotiations with Eller Media Company ("Eller") regarding the submission of a joint bid for the City contract. However, only a few days before the deadline for submissions, and after representing that it would submit a joint bid with CSI, Eller backed out of its prospective joint bid with CSI and instead told CSI that it would be bidding with another company, Adshel, Inc. ("Adshel"). *Id.* Eller then bid with Adshel and won. CSI bid with others and lost. *Id.* Thereafter, CSI sued Eller, Adshel and Clear Channel Communications (Eller's parent company), alleging, inter alia, that Eller committed fraud against CSI. Specifically, CSI argued that in the absence of its reliance on Eller's false promise, CSI would have submitted a bid that would have prevailed over the winning Adshel-Eller bid. *Id.* at 724.

After a jury verdict finding in favor of CSI on its fraud claim and award of lost profits to CSI in the amount of $9 million, the district court granted Eller's motion for judgment as a matter of law and invalidated the jury's lost profits award. *Id.* at 734. Although CSI submitted evidence that Eller had misappropriated its bidding strategies and trade secrets, the district court nevertheless found that "given the strength of the Eller-Adshel bid, there [was] *no scenario* by which a jury could have reasonably concluded that plaintiff could have won the bid,

either alone or in combination with anyone other than Eller." *Id.* (emphasis in original). In reaching this determination, the court noted that Eller's bid outscored CSI's by 76 points (out of a potential total of 500 points) according to the scale used by the City to evaluate the bids, which the district found to be a very "lop-sided" margin of victory. *Id.* at 733. The court explained:

> Had the bids been closer, a jury could reasonably have found that the eleventh-hour scramble prejudiced plaintiff. In that case, the verdict would have to be sustained. Had the bids been closer and the secret bidding data a deciding factor, the verdict likewise would have to be sustained. But the record does not come close to supporting either scenario.

Id. at 734. CSI appealed the district court's JMOL, and the Ninth Circuit reinstated the CSI's lost profit award. *City Solutions II*, 365 F.3d at 841. The Ninth Circuit explained that the district court "failed to recognize that a jury could have found that CSI was hurt by Eller's *improved* proposal attributable to its misuse of CSI's confidential bidding strategies", *id.* (emphasis in original), and found that "a reasonable jury could have found that, had Eller not promised to bid with CSI, it would have found someone else with whom to bid earlier in the process, thereby placing it in a better position to compete." *Id.* The Ninth Circuit thus held that "there was a legally sufficient basis for a jury to find that the City might have awarded CSI the contract absent Eller's fraudulent conduct." *Id.*

The facts of *City Solutions* are completely inapposite to Plaintiff's case. Had the MAAF Group initially promised to submit a joint bid with Plaintiff and then

backed out at the last minute forcing Plaintiff to submit a competing independent bid ***against the MAAF Group's bid***, Plaintiff might have a viable claim against Defendants for lost profits based upon *City Solutions II*. Of course, such a claim would fail unless Plaintiff could present evidence that the MAAF Group benefitted from the knowledge it misappropriated from Plaintiff during their negotiations and/or Plaintiff's bid was weakened as a result Plaintiff's "eleventh-hour scramble" to finalize its independent bid. In this case, however, rather than being fraudulently prevented by the winning bidder from joining its winning bid and reaping those benefits as in *City Solutions*, Plaintiff alleges that it was fraudulently induced by the winning bidder into joining the winning bid and ***sharing*** the spoils of victory.

b. Plaintiff Has Failed to Prove that a Reasonable Jury Could Find that it Would Have Acquired the Entire Insurance Business

In California, a defrauded plaintiff must establish a complete causal relationship between the alleged fraud or deceit and its alleged damages in order to recover on a fraud claim. *See City Solutions II*, 365 F.3d 835, 840 (9th Cir. 2004). Here, Plaintiff claims that "there is substantial and convincing evidence that [it] would have acquired all of ELIC had Defendants not defrauded [it]." Opposition at 26. Specifically, Plaintiff argues:

> Had Sun discovered the fraudulent portage arrangements in the spring of 1993, it immediately would have disclosed these illegal ownership arrangements to the Commissioner and sought to purchase 100%

> of ELIC. The Commissioner and his aides are unwavering in their testimony that, upon learning of the fraud, they would not have allowed the French investors to purchase the insurance assets, both because the French investors had engaged in a fraud and they did not qualify under Insurance Code section 699.5. (AF 73) Sun then would have acquired 100% of ELIC's insurance assets because the terms of sale to the MAAF Group were the best deal available at the time; Sun was willing to subscribe to these same terms; there is no evidence that any other party was willing to enter such a deal;[20] and the Commissioner was under substantial pressure to complete the sale quickly with no one buyer ready to proceed quickly except Sun.

Id. at 27.[21]

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[20] The Court disagrees with Plaintiff's contention that "there is no evidence that any other party [aside from Plaintiff] was willing to enter such a deal." Defendants have, in fact, submitted substantial evidence indicating that numerous parties may have potentially re-entered the bidding "fray" in the event the MAAF Group's bid had been disqualified. *See, e.g.*, CL Defendant's Reply to Plaintiff's Statement of Genuine Issues of Material Fact at UF No. 140.

[21] Plaintiff merely asserts, without justification, that the proper hypothetical scenario for the Court to consider in conducting its lost profits reasonable certainty analysis is one in which Plaintiff has somehow miraculously learned of the portage agreements and the MOU. Although Plaintiff's proposed hypothetical scenario tracks the reliance element of a fraudulent concealment cause of action as set forth in *Lovejoy*, *see* Note 9, *supra* (". . . (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known

However, even after giving Plaintiff the benefit of all reasonable inferences, *see American International Group*, 926 F.2d at 836, the Court finds that the evidence presented by Plaintiff fails to establish a genuine issue of material fact as to whether it is reasonably certain that Plaintiff would have acquired all of ELIC's insurance business.[22] Instead, in light of

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of the concealed or suppressed fact . . ."), the effect of Plaintiff being afforded such knowledge, not only appears to directly contradict the framework mandated by *City Solutions I*, *see City Solutions I*, 242. F. Supp. 2d at 733, 734, n. 11 (court holding that "[a]s for lost profits, the proper comparison must be between the scenario had plaintiff not relied on the false promise versus the actual scenario" and thereafter expressly rejecting CSI's argument that the proper comparison should have been whether CSI would have beaten Adshel if the latter wasn't joined by Eller), but, more importantly, seems to impermissibly put plaintiff "in a better position than [it] would have been had the wrong not been done." *See Christiansen*, 186 Cal. App. 3d at 790.

[22] As "evidence" in support of its argument, Plaintiff submits a declaration from Karl L. Rubinstein ("Rubinstein"), former counsel to the Commissioner of Insurance. The thrust of Rubinstein's opinion is that if the Commissioner had discovered the existence of the portage agreements in or around the Spring of 1993, he would have permitted Plaintiff to acquire 100 percent of New California (or to create its own alternate holding arrangement for the ELIC insurance assets) and the Rehabilitation Court would have approved the Commissioner's decision. Defendants object to Rubinstein's expert testimony because it fails to satisfy both the reliability and relevancy prongs of Rule 702 of the Federal Rules of Evidence. The Court sustains Defendants' objections and finds that Rubinstein has failed to articulate a reliable methodology in arriving at his conclusions as required by *Daubert*. In light of Rubinstein's own testimony that the Commissioner himself is the best person to speak to how the Commissioner would have acted in the Spring of 1993, the Court finds that Rubinstein's alleged "specialized knowledge" is based on nothing more than his personal or

the "laundry list" of contingencies upon which Plaintiff's theory depends, the Court finds that Plaintiff's purported lost profits are simply far too speculative to merit consideration by the jury. As argued by the CL Defendants and as confirmed by the Commissioner's testimony, had the portage agreements been disclosed to Plaintiff in the Spring of 1993, the following ***nine*** contingencies would still have had to occurred before Plaintiff could have obtained 100 percent of the ELIC assets:

> (1) the Commissioner would have had to rescind the entire deal; (2) the Superior Court would have had to approve the rescission; (3) the Commissioner would have had to solicit new proposals; (4) AIG would have had to submit a proposal; (5) AIG's new proposal would have had to be comprehensive (meaning it would have needed to address the junk bonds as well as the insurance company); (6) the DOI [California Department of Insurance] would have had to approve a plan that would have resulted in the sale of the entire insurance company to a single purchaser instead of to several purchasers under the Investor Group/AIG sale; (7) the Commissioner would have had to reject all other interested bidders, including NOHLGA, members of the former Sierra

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subjective beliefs and unsupported speculation. *See* Rubinstein Depo. at 95:1-4 ("Q: Do you think you're better to tell us what John Garamendi would have done than John Garamendi himself? A: No.") (Excerpts of the Rubinstein Depo. are attached as Exhibit E to the Declaration of Catherine A. Stone in Support of Joint Motion to Exclude Testimony and Reports of Karl L. Rubinstein).

> Group, Pacific Mutual, and Leucadia; (8) the Rehabilitation Court would have had to exercise its discretion to approve the new proposal; and (9) the approved proposal would have had to withstand review on appeal.

CL Motion at 13. In addition, as a prerequisite to establishing any of the aforementioned contingencies, Plaintiff would also have to establish with reasonable certainty that if Defendants had disclosed to Plaintiff the existence of the portage agreements during their negotiations with Plaintiff in the Spring of 1993, Plaintiff would have recognized their significance *at that time* and revealed them to the Commissioner. *See* Artemis Motion at 27. As argued by the Artémis Defendants, the evidence in the record is to the contrary.[23] Indeed, Plaintiff's then outside counsel, Marc Gamsin, and its CEO, Broad, both testified that their understanding of the significance of the portage agreements is based strictly on *after-the-fact* knowledge. *See* Deposition of Marc Gamsin ("Gamsin Depo.")[24] at 127:7-9 (". . . [M]y understanding of those agreements is from the previous proceedings, the previous cases."); *Id.* at 127:17-20 ("My understanding of those [portage agreements] comes from a number of sources. You know, one, reading about and

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[23] *See, e.g.*, Plaintiff's "draft term sheet" for the New California acquisition dated June 2, 1993, Jain Decl. at Exhibit 26, as well as the Altus guarantee. The Court finds that these documents indicate that Plaintiff was aware of Altus' involvement or potential involvement with the MAAF Group and nevertheless went forward with the transaction.

[24] These excerpted portions of the Gamsin Depo is attached as Exhibit 6 to the Declaration of Anita Jain ("Jain Decl.") in Support of the Artemis Motion.

reading some materials from the criminal and the civil case."); Broad Depo. at 157:24-158:2 ("Well, ***knowing what we learned afterwards***, we would have pointed out to the Commissioner and the courts that you had an illegal purchaser of an insurance company.") (emphasis added);[25] but see 2003 Deposition of Jay Wintrob ("2003 Wintrob Depo.") at 444:9-13 (Exhibit 164 to Swerdlow Decl.) (". . . Also, I'd find it surprising that this hadn't come out earlier and that there weren't issues with the Altus group being involved under the California law. And so I'd want to share that with the Department of Insurance. . . . it would be very uncomfortable knowing that we were dealing with a bunch of liars."). Accordingly, the Court finds as a matter of law that Plaintiff has not provided evidence sufficient to raise a genuine issue of material fact that could support a jury's finding that Plaintiff would have acquired 100 percent of ELIC's insurance business had the portage agreements been disclosed in the Spring of 1993. The Court thus concludes as a matter of law that Plaintiff

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[25] Although Broad submits a Declaration in support of Plaintiff's Opposition in which he states "[h]ad any of these facts been disclosed to me, Sun would not have agreed to join the MAAF group's bid but instead would have alerted the Commissioner to these facts and pursued the acquisition of ELIC's insurance business independently", *see* Declaration of Eli Broad in Support of Plaintiff's Opposition ("Broad Decl.") at ¶ 18, this self-serving post hoc declaration cannot be used to create a genuine issue of material fact as to what Broad would have done ***at the time*** given his prior deposition testimony that his understanding of the significance of the portage agreements comes from what he "learned afterwards". *See Radobenko*, 520 F.2d at 54344 (9th Cir. 1975) (holding that a party who has been examined at length on deposition cannot raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony).

is not entitled to lost profits under its "defrauded bidder" theory.

The Court's holding in this regard tracks Judge Matz's similar holding in the Garamendi Action rejecting the recovery of lost profits by Sierra against the MAAF Defendants despite the fact the Court had already entered default in Sierra's favor on the issue of liability. Judge Matz explained:

> Whether the losing bidder had an absolute right to be awarded the 'contract' is a relevant consideration in determining the measure of damages available when the disappointed bidder sues the public agency under a promissory estoppels theory. *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal.4th 305, 315 (2004). That also should be a relevant consideration here. Here, as in *Kajima/Ray Wilson*, the Commissioner 'was authorized to reject all bids . . . [and as a result Sierra] did not know at [the] point [when it had reasonably incurred bid preparation costs] whether the contract would even be awarded.' *Id.* at 315-16. Nor did Sierra know whether, *if* the Commissioner did award a contract, the award would go to Sierra or to NOHLGA. *See Id.* And Sierra also did not know whether, even if the Commissioner did pick its bid, the Rehabilitation Court would have approved the Commissioner's selection. Therefore, as stated in *Kajima/Ray Wilson*, 'given these uncertainties which are inherent in competitive bidding, bid preparation costs, not lost profits, were the only costs reasonably incurred.' *Id.* at 316.

See Garamendi Action, December 7, 2005 Order Re Sierra's Motion for Default Judgment Against MAAF Defendants at 5. The Court finds that Plaintiff's lost profits damages claim is as speculative, if not moreso, than Sierra's. Whereas Sierra at least submitted a bid (albeit an unsuccessful one) for the ELIC insurance business in 1991, Plaintiff neither finalized nor submitted its purported independent bid in the Spring of 1993.[26] Indeed, as the Artemis Defendants insightfully argue, "allowing [Plaintiff] to recover lost profits damages would lead to an absurd result: [Plaintiff], who, at best, was a would-be bidder in

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[26] A copy of Plaintiff's purported "draft bid" dated June 7, 1993, is attached as Exhibit 3 to the Broad Decl. However, the notes of Jay Wintrob ("Wintrob"), Plaintiff's CEO and chief negotiator in the purchase of New California shares, authored contemporaneously with his negotiations with Cogut the following day demonstrate that it was unlikely that Plaintiff would submit an independent bid even under Plaintiff's proposed hypothetical scenario. The notes, dated June 8, 1993, contain, *inter alia*, the following observations: "fearful if we bid separately it wld delay things & that wldn't be good for industry or p'holders" and, crossed out but still clearly visible, "IF YOU CAN'T BEAT 'EM, JOIN 'EM." *See* Declaration of Thomas J. Benedict in Support of CL Motion ("Benedict Decl.") at Exhibit 36 (SAV00008). Finally, the Commissioner has unequivocally testified that he would only consider "comprehensive", i.e., "bonds-in" proposals. Since it is undisputed that Plaintiff's proposed independent bid, if submitted, would have been solely for the acquisition of the insurance business, Plaintiff's evidence of its "draft bid" still does not even come close to establishing a genuine issue of material fact as to whether it is reasonably certain that the Commissioner would have selected (or the Rehabilitation Court would have approved) Plaintiff's hypothetical non-conforming bid. *See* Deposition of John Garamendi ("Garamendi Depo.") at 164:22-25 (Benedict Decl. at Exhibit 5) (". . . I don't know how we would have accepted the Sun bid [in 1993] because it wasn't comprehensive. So I don't think we would even go to where you're talking.").

some hypothetical auction of the ELIC insurance business in 1993 that never actually took place, would obtain lost profits relating to the ELIC insurance business, whereas Sierra, who indisputably bid for the ELIC insurance business and arguably would have been the winning or second-place bidder but for the Altus/MAAF bid, will have obtained none of those profits." Artemis Motion at 37. Neither the evidence submitted by Plaintiff, nor *City Solutions I or II*, nor Judge Matz's aforementioned holding in the *Garamendi* Action support such a result.

b. Plaintiff Is Not Entitled to Lost Profits as a "Defrauded Purchaser"

Although not fully developed in Plaintiff's moving papers,[27] Plaintiff's "defrauded purchaser theory is based upon Section 3343(a)(4) which provides, in pertinent part: "Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, [he is entitled to recover] an amount which will compensate him for any loss of profits or other gains which were ***reasonably anticipated*** and would have been earned by him from the use or sale of the property had it

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[27] Likely because Plaintiff anticipated that this theory would fail in light of *Kenly*, it decided to put all of its eggs in its "defrauded bidder" basket. Although Plaintiff attempts to further bolster both its "defrauded purchaser" and "defrauded holder of a right of first refusal" theories in its May 22, 2007 response to the Court's May 18, 2007 Order requesting additional briefing, the Court will not consider such arguments because they are outside the scope of the Court's Order which specifically requested additional briefing only as to the proper lost profits reasonable certainty analysis under Plaintiff's "defrauded bidder" theory. *See* May 18, 2007 Order Directing Parties to File Supplemental Briefs Re: Defendants' Motions for Summary Judgment at 1.

possessed the characteristics fraudulently attributed to it by the party committing the fraud . . . ." Cal. Civ. Code § 3343(a)(4) (emphasis added). In this respect, Plaintiff argues that, even if the Court were to find that Section 3333 does not apply, Plaintiff is entitled to recover lost profits under Section 3343 because it entered into the "transaction" with Defendants "in reliance on the fraud and in anticipation of profits from the later use and sale" of the remaining shares of New California. Opposition at 47, n. 14; *see also* SAC at ¶ 69 (claiming, *inter alia*, damages in the form of "lost profits on SunAmerica's prospective purchase of New California stock"). Specifically, Plaintiff contends that based upon Defendants' misrepresentations,[28] Plaintiff "reasonably anticipated", *see* Cal. Civ. Code § 3343(a)(4), that "the members of the MAAF Group [would not be] interested in holding their shares for the long-term and that if [Plaintiff] joined the MAAF bid it would be the 'exit strategy' for the other investors and the logical buyers of the shares." Opposition at 52 (*citing* Plaintiff's AF Nos. 63, 64, 66, 185). The Court finds, however, that there are two major flaws with Plaintiff's "defrauded purchaser" theory.

First, the Court finds that the oral misrepresentations allegedly made by Cogut—*inter alia*, that the other investors in New California were "not long-term investors" and that Plaintiff was the "logical buyer" of the shares of New California owned by the other parties to the Stockholders Agreement-are not actionable statements about past or existing facts, but are instead puffery or expressions of opinion about Plaintiff's investment prospects in New Cali-

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[28] The alleged misrepresentations are identified in Note 15, *supra*.

fornia, and that any purported reliance thereon by a sophisticated investor like Plaintiff was not "justifiable" as a matter of law. *See, e.g., Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999); *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1154 (S.D. Cal. 2001); *Neu-Visions Sports, Inc. v. Soren/McAdams/ Bartells*, 86 Cal. App. 4th 303, 308 (2000). Indeed, Wintrob conceded under oath that Cogut's statements were neither promises nor guarantees:

> We were told by Craig Cogut on a couple of occasions that if you just think about the situation logically, that, you know, if we were good partners and good shareholders, ultimately we were the logical acquirer of the rest of the—of the remaining shares of Aurora National, or of Holdco, New California. ***But there were no guarantees***. The investor group was sincere and committed to the transaction. ***But, you know, if you're a good partner*** and you perform as you say you can perform and have all these attributes, ***you are well-positioned to have that opportunity at some point in the future.***

2003 Wintrob Depo. at 103:6-17 (emphasis added).[29] Wintrob also clearly stated that Cogut never committed to any New California investor selling its shares to Plaintiff:

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[29] Portions of the 2003 Wintrob Depo. are attached as Exhibit 12 to the Declaration of Susan St. Denis in Support of the MAAF Motion ("St. Denis Decl.") and the referenced excerpt above is cited in support of Uncontroverted Fact No. 16 in MAAF's Statement of Uncontroverted Facts and Conclusions of Law in Support of its Motion ("MAAF UF").

> Q: So you had the understanding that the other investors might be willing to sell their shares to SunAmerica over time?
> A: No. Definitely not.
> Q: Okay
> A: It was the loosest - if you think about the situation, you're the logical, ultimate buyer of the shares. ***But there's no guarantees. There's no assurances***. We're not going to have a timetable. No one's going to tell us what to do.

Id. at 103:18-104:2 (MAAF UF No. 16) (emphasis added); see also id. at 407:21 - 408:1 (MAAF UF No. 15) ("My understanding ultimately was Craig -- Craig did a good job of trying to keep reminding us of the, you know, logic, that we would in all likelihood, you know, be best positioned to be the exit strategy ***without ever making a commitment that, in fact, we'd ever have that opportunity***.") (emphasis added); Plaintiff's Statement of Genuine Issues of Material Fact in Opposition to the CL Motion at No. 61 (Plaintiff admitting that it is "undisputed" that "[Plaintiff] understood at the time it agreed to join the Investor Group that it had no guarantee it would ever acquire additional shares of [New California] following the close of the insurance transaction."). Broad's testimony also undermines Plaintiff's argument that it reasonably anticipated acquiring the remaining New California shares based upon Cogut's oral misrepresentations: "Craig Cogut said a lot of things. Some I took at face value, some I didn't." Broad Depo. at 109:17-18. Based upon the admissions of Plaintiff's own principals, the Court finds as a matter of law that Plaintiff's "defrauded purchaser theory fails to the extent it is based on Cogut's alleged oral misrepresentations.

Second, even assuming that Defendants' other alleged misrepresentations—*inter alia*, the misrepresentations as to the true identities of the other New California investors and concealment of the portage agreements and MOU—are actionable misrepresentations, they cannot support Plaintiff's recovery of lost profits under Section 3343(a)(4) because they related exclusively to the remaining 67 percent of New California shares that were not acquired by Plaintiff. As explained by the California Court of Appeal in *Kenly*, 16 Cal. App. 4th at 55, a plaintiff defrauded in connection with the purchase of property is only entitled to recover lost profits on property he actually acquired. He is not entitled to lost profits on other property he did not acquire, even if he reasonably anticipated acquiring said property in reliance on the defendant's fraud. *Id.*

In *Kenly*, a purchaser (Kenly) of a promissory note securing a first trust deed to the farm for $412,000 alleged that he was fraudulently induced to purchase the note in reliance on the owner's promise to sell the farm to the purchaser for $2 million following the purchase of the note. The owner (Ukegawa) thereafter reneged on his promise to sell Kenly the farm and ended up selling it to third parties. Although Ukegawa eventually paid Kenly the full amount due on the, note, Kenly nevertheless sued Ukegawa for fraud and sought to recover the lost profits from his anticipated purchase and resale of the farm. The court, however, rejected Kenly's theory because it would "expand the 'lost profit' component of a fraud award beyond the boundaries contemplated by section 3343", *Kenly,* 16 Cal. App. 4th at 55, and thus held that Kenly was not entitled to lost profits on property he "never acquired". *Id.* The court explained:

> Section 3343, subdivision (a)(4) permits a party who is fraudulently induced to "purchase or otherwise acquire the property in question" to realize profits which would have been earned had 'the property' possessed the characteristics attributed to it. That language clearly contemplates that the party actually acquire the property in question, i.e., the property from which profits were to be realized. Here, the property in question was the farm, which was to yield profits. The farm was never acquired. The only property acquired was the note, and the profits [sought] were not based on the sale of the note but on the farm to be acquired in the future. [¶] Kenly argues it [is] proper to award profits because purchase of the note was the first step toward acquiring the farm, from which he expected profits. However, this theory strains section 3343 because it requires us to interpret the multiple references to 'property' in section 3343, subdivision (a)(4) as referring to different properties, i.e., here the property "acquired" would be the note while the 'profitable' property would be the farm.

Id. The Court finds that *Kenly*'s holding applies with equal force to Plaintiff's claim for lost profits attributable to the 67 percent of New California shares that it did not acquire. Just as Kenly argued that his purchase of the note was preparatory to his anticipated purchase of the profit-producing property, i.e., the farm, Plaintiff argues here that its purchase of a 33 percent interest in New California was preparatory to its anticipated purchase of ***other*** profit-producing property, i.e., the remaining 67 percent of

New California shares. Since *Kenly* explicitly holds that a plaintiff may only recover lost profits under Section 3343(a) based upon property it actually acquired, and since Plaintiff never acquired the remaining 67 percent of New California shares, the Court finds that Plaintiff's "defrauded purchaser" theory fails as a matter of law.[30]

c. Plaintiff Is Not Entitled to Lost Profits as a "Defrauded Holder of a Right of First Refusal"

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[30]Although the case is not cited in Plaintiff's Opposition, during oral argument Plaintiff's counsel argued that *Croeni v. Goldstein*, 21 Cal. App. 4th 754 (1994), supports its recovery of lost profits pursuant to Section 3343. In *Croeni*, the appellants alleged that they agreed to sell their business to and enter into a covenant not to compete based upon false promises made by the respondent. *Id.* at 757. Despite the fact that they had already sold their business, the appellants sought to recover the lost profits and other benefits they allegedly would have accrued had they not sold their business. *Id.* After discussing the implications of Section 3343(a)(3), the court held that appellants were entitled to seek to proceed against respondent and the other defendants for lost profits "as though they were rescinding." *Id.* at 760. The Court finds, however, that *Croeni* is inapposite to the present case because it concerned the recovery of lost profits by a defrauded ***seller*** under Section 3343(a)(3), ***not*** a defrauded purchaser under Section 3343(a)(4) or a defrauded bidder under *City Solutions I*. Section 3343(a)(3) provides: "Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, [the defrauded party is entitled to recover] an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it." Cal. Civ. Code § 3343(a)(3). Quite simply, since Plaintiff never owned or otherwise acquired the remaining 67 percent of New California stock, Plaintiff cannot conceivably seek the lost profits that it allegedly would have earned had it "retained" such stock.

In addition or in the alternative to its "defrauded bidder" and "defrauded purchaser" theories, Plaintiff also argues it is entitled to lost profits as a "defrauded holder of a right of refusal". Pursuant to this theory, which the Court finds to be little more than an extension of its "defrauded purchaser" theory, Plaintiff argues that had it received the right of first refusal that it thought it had bargained for, it is reasonably certain that it would have acquired the remainder of the New California shares and the profits attributable thereto. *See* Post-Hearing Submission at 2; Opposition at 53-55. Under Plaintiff's theory, *Kenly* would be inapposite because whereas the purchaser of the note in *Kenly* never bargained for any explicit future right to acquire the farm, Plaintiff here bargained not only for the 33 percent interest in New California but also a right of first refusal with respect to the purchase of the remaining New California shares.

Plaintiff's theory, however, misconstrues the nature of a right of first refusal. Unlike an option contract, a right of first refusal "merely gives the [holder] the right to purchase the property if the owner decides to sell. . . . If the owner decides not to sell, the buyer cannot compel a sale." *Miller and Starr California Real Estate 3d* § 2:10 (2007). Thus, regardless of the actual identities of the permitted transferees, Plaintiff could never have compelled them to sell it their shares. Indeed, Wintrob admitted during his deposition in the *Garamendi* Action in 2003 that the terms of the right of first refusal "realistically . . . didn't matter" once Plaintiff decided that it was only going to purchase a minority interest in New California:

> Q: . . . [D]id it matter to SunAmerica who the permitted transferees were?

. . .

> A: In one sense it mattered in that, again we remained interested ultimately in assessing the likelihood that we could have a reasonable chance over time to acquire more shares in the insurance company. [¶] **But for the most part it didn't matter** in that once we agreed to negotiate this type of agreement with Craig [Cogut] and this investment group, because of the way the agreement was structured in terms of our being a minority shareholder, **realistically it didn't matter at all**. We weren't going to have any more or less control or influence regardless of who the shareholders were. **We were really making an investment as a minority shareholder in a private company with the right at some point to exit the investment under certain circumstances.**

2003 Wintrob Depo. at 124:25-125:19 (St. Denis Decl. Exhibit 12). The right to "exit" discussed by Wintrob in the above testimony refers to a "put" provision that was included in the Stockholders Agreement at Plaintiff's insistence. Pursuant to this "put" provision, Plaintiff was granted the right to sell its shares back to New California at any time between 6 and 12 months after closing, and if Plaintiff elected to exercise this option, Plaintiff was guaranteed a 10 percent return on its investment. *See* Artemis Parties' Response to Plaintiff's Statement of Genuine Issues of Material Fact at Fact No. 13. In a later deposition, Wintrob explained, albeit somewhat inartfully, the interrelation of the "put" and right of first refusal provisions: ". . . Because we didn't have . . . a perfect right of first refusal, . . . it was always

helpful to have additional provisions that would be helpful to us as a minority shareholder in case things didn't work out the way we had hoped they would work out." 2007 Deposition of Jay Wintrob ("2007 Wintrob Depo") at 331:16-24.[31] Indeed, Plaintiff was so concerned about it's ability to recoup a ***short-term*** 10 percent profit on its minority investment that it further insisted that New California's obligation under the "put" to buy back Plaintiff's shares be backed by a separate guarantee from a financially sound institution that could pay for New California's repurchase of Plaintiff's shares in the event that New California did not have the requisite funds. *See* Plaintiff's AF No. 283. Interestingly, the financially sound institution agreed to by the parties to guarantee Plaintiff's "put" was none other than Altus, a party that Plaintiff now alleges was a ringleader, albeit undisclosed, of Defendants' fraudulent "conspiracy". *See id.* The undisputed fact that Plaintiff specifically bargained for its own exit strategy from its investment in New California in the form of the "put" provision backed by Altus' guarantee hardly supports Plaintiff's claim that it expected to acquire the remaining New California shares based upon its right of first refusal.

Wintrob's own notes authored contemporaneously with his negotiations with Cogut on June 9, 1993 further contradict Plaintiff's argument that it could have reasonably anticipated acquiring the remaining New California shares based upon its right of refusal. Wintrob wrote: "Craig [Cogut] wants me to understand the following: . . . (E) EB [Eli Broad] ***falsely believes*** that the holders will want out quick, and

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[31] The referenced excerpt from the 2007 Wintrob Depo. is attached as Exhibit 5 to the Jain Decl.

certainly following litigation." *See* Benedict Decl. at Exhibit 36 (SAV00012) (emphasis added). In light of Wintrob's notes and testimony reflecting his contemporaneous awareness of the relative worthlessness of Plaintiff's right of first refusal and Plaintiff's insistence on an exit strategy from New California in the form of the "put" provision backed by the Altus guarantee, the Court finds that there is no genuine issue as to whether Plaintiff could have ***reasonably*** anticipated acquiring the remaining 67 percent of New California shares based upon its right of first refusal. Accordingly, the Court finds as a matter of law that Plaintiff is not entitled to lost profits under its "defrauded holder of a right of first refusal" theory.[32]

2. Plaintiff Has Not Proven Any Damages As a Result of Its Contribution Towards New California's Litigation Defense and Settlement Costs

Under Plaintiff's "defrauded bidder" theory, Plaintiff argues that its lost profits award should not just be limited to the net profits that Defendants ultimately reaped by virtue of their various ownership interests in New California, but should also include additional amounts to compensate for

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[32] The Court's holding in this regard is consistent with the Court's previous holding that, in addition to being barred by the applicable statute of limitations, "Plaintiff's claim for interference with prospective economic advantage also ***fail[ed] because of the speculative nature of its claim that it had a reasonable expectation of acquiring the shares of New California***." *See* February 28, 2006 Order Granting in Party and Denying in Part Defendants' Motions to Dismiss at 11, n. 10 (emphasis added) (*citing Youst v. Longo*, 43 Cal. 3d 64, 71 (1987).

what would have been non-existent litigation settlement and defense expenditures had Plaintiff, a purportedly legal purchaser, purchased 100 percent of ELIC's insurance business in 1993. Opposition at 69. However, since the Court has found that Plaintiff has not presented sufficient evidence to even raise a jury question as to the reasonable certainty of its acquisition of the entire insurance company in the absence of Defendants' alleged fraud, *see* Section IV(A)(1)(a), *supra*, these additional alleged damages are not recoverable.

Alternatively, Plaintiff seeks to recover its share of New California's litigation settlement and defense costs under Section 3343(a)(4) arguing that it "reasonably anticipated" that New California was a legal bidder and that had New California "possessed the characteristics fraudulently attributed to it" by Defendants, i.e., had New California not been illegally controlled by foreign interests, Plaintiff's profits as a result of its purchase of a 33 percent interest in New California would have been greater. Opposition at 71. At oral argument, however, Plaintiff's counsel admitted that whereas its litigation defense and settlement costs have amounted to in the "ballpark" of $50 million, Plaintiff has already received a $112 million return on its initial $33 million investment and stands to receive an additional $150 to $160 million if the sale of New California to Swiss Re is completed. *See* Hearing Transcript at 12-13. Thus, at the very least, Plaintiff has reaped a "ballpark" $29 million net profit as a result of being allegedly fraudulently induced by Defendants to become a minority investor in NCLH. Under such circumstances, not only would Plaintiff's recovery of its claimed legal settlement and defense costs impermissibly reward Plaintiff "benefit-of-the-bargain" damages, *see, e.g.*,

Alliance Mortgage, 10 Cal. 4th at 1239, but it would also violate the axiomatic principle that "[a] plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done." *See Christiansen*, 186 Cal. App. 3d at 790; *see also Alliance Mortgage*, 10 Cal. 4th at 1240 ("[U]nless the plaintiff merely seeks to rescind the contract, it must suffer actual monetary loss to recover on a fraud claim.") (citations omitted). Accordingly, since Plaintiff has not presented any evidence that it suffered an "actual monetary loss" due to Defendants' alleged fraudulent conduct, Plaintiff cannot recover any damages pursuant to its fraud claim.

3. Plaintiff Has Not Proven Any Damages Related to the Allegedly "Excessive" Purchase Price it Paid for its New California Stock

In addition to the damages previously discussed, Plaintiff also alleges in its SAC that it paid an "excessive purchase price" for its New California stock. *See* SAC at ¶ 69. Not only has Plaintiff failed to cite any evidence in support of this allegation, the allegation also appears to be directly contradicted by the following excerpt from Plaintiff's very own Opposition: "Despite an aversion to sharing their anticipated profits from the insurance business, [Jean Francois] Henin[33] and [Francois] Pinault[34] permitted Sun to acquire a 33% interest. Tellingly, they did so without extracting any premium or profit from Sun: they sold 33% of the $100 million investment to Sun at their cost of $33 million." Opposition at 27. Plain-

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[33] Managing Director of Altus.

[34] Artémis' Chairman.

tiff's "excessive" purchase price allegation is also belied by its Verified Complaint in Intervention, in which admitted that it paid "market value" for its New California shares. See Verified Complaint In Intervention at ¶ 32 (Supp. Benedict Decl. at Exhibit 6). Accordingly, the Court finds as a matter of law that Plaintiff has not proven any damages attributable to its payment of an "excessive" price when it purchased its 33 percent interest in New California.

4. Plaintiff Is Not Entitled to Any Recovery under an Unjust Enrichment Theory

As an alternative to the aforementioned legal theories of recovery, Plaintiff seeks the equitable remedy of unjust enrichment. *See* Opposition at 72-74. Specifically, Plaintiff argues that "[a]s between [Plaintiff], on the one hand, and Defendants, on the other hand, the profits flowing from ownership of ELIC's insurance business properly belong with [Plaintiff], the party that would have obtained those profits in the absence of Defendants' fraud." *Id.* at 73. Defendants argue, *inter alia*, that Plaintiff may not pursue the equitable remedy of unjust enrichment because it has an "adequate remedy at law" and, even if such a theory were permitted, Plaintiff would not be entitled to any recovery thereunder because it has not established any causal connection between the alleged fraud committed against Plaintiff and Defendants' allegedly ill-gotten gains. *See, e.g.,* Artemis Reply at 37; CL Motion at 41-42.

The Court agrees with Defendants on both fronts. First, as correctly argued by the Artemis Defendants, the Court finds that Plaintiff's argument that is entitled to equitable relief "reflects a fundamental

confusion between the concept of an 'adequate remedy at law'-which refers to whether the plaintiff had a legal claim upon which it could have sought relief—and an election of remedies—which relates to whether a party can obtain legal or equitable damages . . ." Artemis Reply at 37 (emphasis in original). Indeed, rather than arguing that it does not have any adequate remedy at law, Plaintiff specifically argues that it has a viable fraud claim and sets forth three separate theories of recovery thereunder. Although the Court has already found herein that Plaintiff is unable to prove any damages attendant to its fraud claim, this finding does not a *fortiorari* justify the award of an equitable remedy in its stead, for as the Supreme Court explained long ago, "[t]he want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct . . . ." *Thompson v. Allen County*, 115 U.S. 550, 554 (1885). Accordingly, the Court finds as a matter of law that Plaintiff is not entitled to any recovery from Defendants under an unjust enrichment theory.

Furthermore, even if Plaintiff were permitted to **seek** restitution from Defendants, the Court finds that Plaintiff has not established that it is entitled to **recover** such equitable relief. California law provides that "[u]nder the law of restitution, an individual is required to make restitution if he or she is unjustly enriched at the expense of another." *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (2004) (alteration in original) (citations omitted). "A person is enriched if the person receives a benefit at another's expense." *Id.* (citations omitted). Although "[n]o wooden formulas exist for determining when restitution of profits realized by a party is permissible", *see University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 342 F.3d 1298, 1311 (Fed.

Cir. 2003), the Court of Appeals for the Federal Circuit has provided the following framework for determining whether or not to permit an allegedly defrauded party to pursue the equitable remedy of unjust enrichment:

> [C]ourts must resort to general considerations of fairness, taking into account the nature of the defendant's wrong, the relative extent of his or her contribution, and the feasibility of separating this from the contribution traceable to the plaintiff's interest. 1 George E. Palmer, *The Law of Restitution* § 2.12 at 161 (1978). Thus, the more culpable the defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that plaintiff can recover all defendant's profits. *See, e.g.*, Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1289 (1989). The trial court must ultimately decide whether the whole circumstances of a case point to the conclusion that the defendant's retention of any profit is unjust.

Id. at 1311-12 (*quoting EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113,118 (Colo. 1995)).

Both *McBride* and *University of Colorado Foundation* recognize that an allegedly defrauded plaintiff seeking to recover under an unjust enrichment theory must establish a causal connection between the alleged fraud and the defendant's gains. *See University of Colorado Foundation*, 342 F.3d at 1311 (". . . the more direct the ***connection*** between the profits and the wrongdoing, the more likely that

plaintiff can recover all defendant's profits.") (emphasis added); *accord McBride*, 123 Cal. App. 4th at 389 (". . . an individual is required to make restitution if he or she is unjustly enriched ***at the expense*** of another.") (emphasis added). Since the Court has already found as a matter of law that Plaintiff has failed to establish any causal connection between Defendants' alleged fraud and Plaintiff's failure to acquire 100 percent of the ELIC insurance assets, the Court also finds as a matter of law that Defendants have not been unjustly enriched at Plaintiff's expense. Accordingly, the Court finds that Defendants are entitled to summary adjudication with respect to Plaintiff's unjust enrichment claim.

V. CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment are **GRANTED**.

In light of the Court's grant of summary judgment in favor of Defendants, Plaintiff's Motions for Summary Judgment or, in the Alternative, Summary Adjudication against the MAAF Defendants and Artémis S.A. are each **DENIED**.

The Artérnis Defendants, the CL Defendants and the MAAF Defendants shall meet and confer and lodge a Proposed Judgment consistent with this Minute Order and the Court's February 28, 2006 Order within five days from the date of this Minute Order.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

APPENDIX F

Federal Rule of Civil Procedure 12.
Defenses and Objections: When and How Presented;
Motion for Judgment on the Pleadings;
Consolidating Motions; Waiving Defenses;
Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General.

Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.

The United States, a United States agency, or a United States officer or employee sued only in an offi-

cial capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity.

A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion.

Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings.

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion For a More Definite Statement.

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and

must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion To Strike.

The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join.

A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions.

Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived.

A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others.

Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction.

If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial.

If a party so moves, any defense listed in Rule 12(b)(1)-(7) - whether made in a pleading or by motion - and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

APPENDIX G

Federal Rule of Civil Procedure 56.
Summary Judgment

(a) By a Claiming Party.

A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party.

A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts.

If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability.

An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General.

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavits Submitted in Bad Faith.

If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

APPENDIX H

Paragraph 86 of AIG's Initial Complaint

86. SunAmerica did not learn, nor, in the exercise of reasonable diligence, could have learned, of the existence of the claims asserted herein before the period on or around late 1998 or early 1999, shortly before the California Fraud Action was filed.

APPENDIX I

Paragraph 64 of AIG's Second Amended Complaint

64. SunAmerica did not learn, nor in the exercise of reasonable diligence, should have learned, of the existence of the claims asserted herein until some time after it entered tolling agreements with all Defendants, as the facts underlying SunAmerica's claims slowly became uncovered in the face of Defendants' efforts to continue to conceal their liability through false denials of wrongdoing.

APPENDIX J

Paragraph 51 of AIG's Second Amended Complaint

51. SunAmerica acquired a minority interest in the ownership of New California with the plan and expectation that SunAmerica would eventually acquire the rest of the shares of New California from the MAAF Syndicate. This expectation was based on, among other things, the fact that (a) MAAF was an automobile insurer in France and the MAAF Syndicate members and their "permitted transferees" under the Stockholders Agreement were not as logical long-term owners of the shares of the restructured insurance business as a life insurer based in California such as SunAmerica; (b) in the Stockholders Agreement, SunAmerica bargained for a right of first refusal in connection with offers by the members of the MAAF Syndicate to sell all their stock in New California to third parties; and (c) a person would lose its status as one of the MAAF Syndicate members' "permitted transferees" unless such person acquired New California stock within one year after the closing date—i.e., unless the "permitted transferee" acquired New California stock on or before approximately September 2, 1994.